Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

OGLEBAY NORTON COMPANY,

Petitioner,

vs.

LOIS E. JENSON, PATRICIA S. KOSMACH, KATHLEEN O'BRIEN ANDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. When reviewing a trial court's decision to exclude opinion testimony that purports to be based on "scientific knowledge", must a reviewing court accept, unless clearly erroneous, the trial court's finding that the data, methods or principles on which the expert relied are not scientifically valid.

II. When reviewing a trial court's decision to exclude opinion testimony that purports to be based on "scientific knowledge", must a reviewing court afford to the trial court the discretion to determine whether the witnesses' opinion can reasonably be drawn from the scientific data, methods or principles from which it purports to be drawn.

LIST OF PARTIES

In addition to the parties named in the caption, Eveleth Taconite Company. Eveleth Expansion Company and United Steel Workers of America, Local 6860, were Appellees before the Court of Appeals, but are not participating in this Petition.

STATEMENT PURSUANT TO RULE 29.6

The Petitioner is Oglebay Norton Company. Laxare, Inc., a West Virginia corporation, is a nonwholly owned subsidiary of Oglebay Norton Company.

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OPINIONS BELOW

The Report of the Special Master to the United States District Court for the District of Minnesota regarding Respondent's compensation and punitive damages claims is not published. Pertinent excerpts from the Special Master's Report are reproduced as Appendix C to this Petition. A complete copy of the Special Master's Report has been lodged with the Clerk of the Supreme Court.

On November 12, 1996, the United States District Court for the District of Minnesota adopted the Special Master's Report and directed the entry of judgment in favor of Respondents in the amounts recommended by the Special Master. The District Court's Memorandum Opinion and Order is not reported, but is reproduced as Appendix B to this Petition.

On December 5, 1997, the Court of Appeals for the Eighth Circuit reversed the judgment of the District Court and remanded the case for trial as to Respondents' compensatory and punitive damage claims. The Court of Appeals' opinion is reported at 130 F.3d 1287 (1997) and is reproduced as Appendix A to this Petition.

On February 18, 1998, the Court of Appeals for the Eighth Circuit denied Petitioner's Motion for Reconsideration. The Order of the Court of Appeals, which is not published, is reproduced as Appendix D to this Petition.

STATEMENT OF JURISDICTION

The statutory basis for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Eighth Circuit issued its opinion in this case on December 5, 1997 and its order denying Petitioner's motion for reconsideration was entered on February 18, 1998. This petition is timely filed.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

Lois E. Jenson and fifteen other current and former employees of a taconite mining company (herein "Eveleth Mines") in which petitioner formerly held an interest, sought equitable relief and damages under Title VII of the Civil Rights Act, and under the Minnesota Human Rights Act ("MHRA"). The District Court certified a class of plaintiffs consisting of all women who had Applied for, or had been employed in, hourly positions at Eveleth Mines who had been, were being, or would be discriminated against on the basis of their sex, dating back to December 30, 1983. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991). The litigation was then bifurcated into a "liability phase" (to determine whether Eveleth Mines violated Title VII and/or the MHRA), and a "damages phase" (to determine the eligibility of individual class members for compensatory and punitive damages under the MHRA). In the "liability phase", the District Court found that Eveleth Mines had engaged in a pattern or practice of maintaining an environment sexually hostile to women, and that women employed at Eveleth Mines had been subjected to sexual harassment as well as discrimination in promotions to the position of step-up foreman. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 889 (D. Minn. 1993).

The "damages phase" was then referred to a Special Master with instructions to consider Respondents' claims of compensatory and punitive damages under the MHRA. Each Respondent sought compensatory damages for mental anguish and emotional distress caused by sexual discrimination, sexual harassment and/or the sexually hostile environment at Eveleth Mines. Each Respondent fully described the events and conditions at Eveleth Mines that she found sexually discriminatory or hostile. The Special Master also received and considered psychological/psychiatric opinion testimony bearing on the general effects of sexual harassment in the workplace, and its psychological and emotional impact. The Special Master observed that,

> . . . some insight into the extent, severity of mental anguish is provided by the victims immediate physical and verbal reaction to the event, by later demonstrable repercussions, by her testimony concerning her subjective reaction, and by [the] effectiveness of her coping mechanisms.

(App. at 73a). The damages trial spanned Approximately seven weeks during which the Special Master heard and observed the demeanor of 102 witnesses whose testimony consumed 7,469 pages of trial transcript. Based on this evidence the Special Master recommended and the District Court awarded substantial emotional distress and mental anguish damages to each plaintiff. (App. at 5a, n.6).[1]

Each Respondent also claimed that her experience at Eveleth Mines caused her to exhibit symptoms associated with a

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1. A Special Master also determined that plaintiff Diane Hodge suffered mental anguish as a result of the hostile environment at Eveleth Mines, and he awarded her $7,000 in compensatory damages, albeit subject to his ruling that her claim had become time barred. (App. 67a).

diagnosable mental disorder which required treatment or entailed other loss or disability. Each Respondent's psychological condition was evaluated by at least one psychologist or psychiatrist whose written report was received and considered by the Special Master. Based on conflicting opinion testimony as to the diagnosis of Respondents' claimed mental disorders, the Special Master found that several of the named Respondents failed to prove that they were exhibiting symptoms that could be associated with a diagnosable mental disorder.

The remaining Respondents attempted to prove the cause of their claimed mental disorders through the testimony of psychologists or psychiatrists who purported to base their opinions on "scientific knowledge." In order to assess the relevance and reliability of these opinions, the Special Master looked to "factors which persuasively show that the expert relied upon research, studies, analysis or techniques which have been subject to scientific scrutiny." (App. at 82a). When that was lacking, the Special Master looked to the individual expert for "an explanation which showed that he followed a methodology, advanced by some objective source, which is scientifically valid." (App. at 82a). The Special Master found that Respondents' experts relied on subjective versions of facts related to them by the individual Respondents; and that, although Respondents had been subjected to outside stresses and traumas capable of significant psychological impact, the experts failed to perform differential diagnosis to account for the individual Respondent's past and present complaints and/or her medical and social history. (App. at 87a-88a).

The Respondents' witnesses relied on the Third or Fourth editions of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (herein "DSM-III" OR "DSM-IV") (App. at 88a). The Special Master found that DSM-III and IV are widely used by practitioners to aid in the diagnosis and classification of mental disorders, and that they

incorporate a recognized *diagnostic* methodology based on "scientific knowledge." (App. at 86a). But the Special Master also found that a clinical diagnosis using DSM-III or IV does not establish the existence of a mental disorder for legal purposes (App. 84a-85a); does not require a determination of the cause of a mental disorder or its associated impairments (App. 85a) and therefor, does not provide a reliable scientific method for determining the cause of a mental disorder. (App. at 88a-89a).[2]

Respondents' causation opinion witnesses were asked to identify the scientific data and methods on which they relied to form their causation opinions, but none identified anything but his or her personal judgment based on a self-selected set of subjective factors.[3] The Special Master found that such personal

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2. In its introduction under the heading "Use of DSM-IV in Forensic Settings," the manual warns:

> When DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes there are significant risks that diagnostic information will be misused or misunderstood.

(DSM-IV at XXIII). The manual specifically acknowledges that "[i]nclusion of a disorder in the classification . . . does not require that there be knowledge of its etiology," and that, "[n]on-clinical decision makers should . . . be cautioned that a diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments." While the DSM-IV associates certain stresses (Combat, rape and physical assault) with the statistically significant symptoms of "post traumatic stress disorder" (PTSD), it does not provide a method by which the stresses that DSM-IV associates with PTSD can be analogized to Respondents' experiences at Eveleth Mines. (*See* Lodging App. at 61, n.57).

3. For example, Dr. Carol Novak claimed to have relied on (Cont'd)

judgments failed to meet the reliability criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Special Master was

> persuaded by the unanimous testimony of psychiatrists and psychologists, called by both sides, that there was no scientific manner for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists.

(App. 89a). Expert opinions on the cause of Respondents' diagnosable mental disorders were excluded, (App. 89a). Without such proof Respondents were unable to establish causation of the damages they attributed to their claimed mental disorders.

In its Memorandum Opinion adopting the findings and conclusions set forth in the Special Master's 416 page Report, the District Court noted that,

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(Cont'd)
"recognized factors" when determining which stressors cause mental disorders, but in response to a direct question as to what factors she relied on "to help you determine which stressors may be contributing to or causing a mental disorder," the best Dr. Novak could do was to say

> Yes there are a number of factors. One is whether the stressor that is described or the trauma that is described is of the type that would be likely to cause a symptom; another would be the timing of the particular symptom in relationship to the stressor; another would be the specificness of the symptom as related to the different stressor; and another one would perhaps be an observation of how someone would react in the mental status examine when asked about the different stressors.

Trial Transcript, Vol. XXIV, page 19.

> [t]his court . . . is satisfied that the final determinations made below are amply supported by the record and that the legal conclusions are likewise correct. In this Court's view, the Special Master performed his duties in an exemplary fashion.

(App. at 67a). Reviewing the same Report, the Court of Appeals made its own, contrary assessment of the Special Master competence suggesting (without finding) that he was biased against Respondents (App. at 8a and n.8) and Respondents' witnesses (App. at 26a). With this preface the Court of Appeals rejected as "questionable" the findings that the lower court had relied on in excluding Respondents' causation opinion testimony (App. at 20a).

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be issued because: (1) the Court of Appeals' decision directly conflicts with a subsequently rendered decision of this Court; (2) the Court of Appeals decision should have been reconsidered by the Court of Appeals in light of this Court's subsequently rendered decision; and (3) the Court of Appeals' error can be remedied by summary reversal or summary remand.

I.

THE COURT OF APPEALS USURPED THE TRIAL COURT'S "GATEKEEPING" FUNCTION IN DIRECT CONTRAVENTION OF THIS COURT'S SUBSEQUENTLY RENDERED OPINION IN *GENERAL ELECTRIC CO. v. JOYNER*.

The Court of Appeals concluded:

> To the extent the special master relied upon *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to support his [exclusionary] rulings, we find his rulings in error.

(App. at 21a).

In *Daubert, supra*, this Court addressed the standard for admissibility of opinion testimony under Federal Evidence Rule 702. The Court charged trial judges with a "gatekeeping" role to ensure that scientific opinion testimony is both reliable and relevant. *Id.*, 509 U.S. at 589 n.7, 597. When "experts" purport to testify as to "scientific knowledge," *Id.* at 590, this Court instructed trial judges to consider whether the data, methods, or principles relied on: (1) can be tested; (2) have been subjected to peer review; (3) have a known or potential rate of error; and (4) are generally accepted in the scientific community. *Id.* 509 U.S. at 593-94.

Daubert does not specifically address the standard by which the trial court's "gatekeeping" function is to be reviewed. However, in a decision that was rendered shortly after the Appellate decision herein, *General Electric Co. v. Joiner*, __ U.S. __, 118 S. Ct. 512 (1997), this Court instructed reviewing courts to afford pertinent trial court rulings "the

deference that is the hallmark of abuse of discretion review." *Id.* at 118 S. Ct. at 517. The Court of Appeals' decision in this case clearly conflicts with that instruction.

The Court of Appeals acknowledged that the Special Master's negative findings would preclude admissibility under *Daubert* (App. at 20a);[4] but without identifying the scientific data, methods, or principles that Respondents' experts could have relied on to form their causation opinions, the Court of Appeals dismissed the Special Master's negative findings as "questionable" (App. at 20a). This usurpation of Daubert's gatekeeping function directly conflicts with the deferential policy articulated in Joyner, — *i.e.*, unless it can point to evidence of pertinent "scientific knowledge," the Court of Appeals is in no position to "question" the special master's negative findings, let alone demonstrate abuse of discretion.

The Court of Appeals appears to have relied on the professional training and practical experience of Respondents' experts as a reason to ignore the trial court's "gatekeeping" determinations. (App. at 16a-20a). But those opinions that were based on Respondents' experts' training and experience — *i.e.*,

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4. The Court of Appeals emphasized the special master's findings that, "[t]here is . . . no scientifically developed psychiatric model or procedure for determining whether a particular stress caused a particular symptom or mental state," (App. at 89a) and that for claimants that were subjected to multiple outside stresses or traumas,

> [n]o one advanced a valid theory which furnishes a scientific basis for distinguishing between the cause and effect of multiple psychological stresses or trauma, or for assigning relative impact or degree of impact to different trauma or stresses.

(App. at 89a).

their clinical opinions concerning diagnosis and treatment — were admitted. (App. at 87a). The Special Master only excluded their non-clinical, science-dependent, opinions on causation.[5] (*See* App. at 89a). As to the latter class of opinions, it was within the trial court's discretion to determine, ". . . that there is simply too great a gap between the data and the opinion proffered." *Joiner*, 118 S. Ct. at 519 (*citing Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (6th Cir.), *cert. denied*, 506 U.S. 826 (1992)). The Eighth Circuit's usurpation of that discretion conflicts with the teaching of Joiner.

The Court of Appeals also relies on other court decisions that have found causation opinions to be probative in psychological injury cases (App. at 24a-25a). The issue left unaddressed is whether the record in this case contains evidence of "scientific knowledge" from which Respondents' experts could draw reliable causation opinions. As explained in Joiner, the proper "gatekeeping" inquiry is not whether the proffered opinion testimony could ever be founded on scientific knowledge. Rather, the issue is ". . . whether these experts'

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5. In *Daubert* this Court considered whether the district court erred in rejecting an opinion on medical causation — *i.e.* the causal connection between exposure to the drug benedictine and the occurrence of birth defects. Like an opinion on the cause of a physical defect or disease, an opinion on the cause of a mental disorder must be based on "scientific knowledge." *See, e.g., Allen v. Pennsylvania Eng'g. Corp.*, 102 F.3d 194, 196-97 (5th Cir. 1996) (affirming exclusion of medical professional's opinion on causal link between the line oxide exposure and brain cancer "[i]n the absence of scientifically valid reasoning, methodology and evidence."); *Cavallo v. Star Enterprise*, 100 F.3d 1150 (4th Cir. 1996) (doctor's opinion on the cause of plaintiff's disease properly excluded as unscientific); but *see Moore v. Ashland Chemical, Inc.*, 126 F.3d 679 (5th Cir. 1997) (admitting medical causation opinion based on clinical experience) (Petition for rehearing en banc granted November 12, 1997).

opinions were sufficiently supported by the . . . studies on which they relied." *Joiner, supra*, 118 S. Ct. at 518.

II.

THE DECISION OF THE COURT OF APPEALS SHOULD HAVE BEEN, BUT WAS NOT RECONSIDERED IN LIGHT OF THE DECISION IN *GENERAL ELECTRIC CO. v. JOINER.*

The decision in *General Electric Co. v. Joiner. supra*, was issued on December 15, 1997, just ten days after the Court of Appeals issued its opinion below. Pursuant to Rule 40, Federal Rules of Appellate Procedure, Petitioner moved the Court of Appeals to reconsider its decision in light of the Joiner opinion.[6] The Court of Appeals issued its order denying Petitioners' Motion for Reconsideration on February 18, 1998. However, by voting for reconsideration, five of the eleven active judges of the Court of Appeals signified that reconsideration was necessary. (App. at 92a).

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6. Petitioner also urged the Court of Appeals to reconsider its conclusion that the trial court improperly shifted to Respondents the insurmountable burden of allocating the cause of Respondents' indivisible psychological injuries among the multiple traumas and stresses to which Respondents were exposed. Regardless of who bears the burden of pleading and proving allocation, Respondents bore the *threshold* burden of proving that Petitioner's conduct was a substantial factor in the causation of Respondents' claimed mental disorders, *Carey v. Piphus*, 435 U.S. 247, 263-264 (1978), and Respondents' evidence was not sufficient to establish substantial factor causation without the properly excluded causation opinions of Respondents' experts. (App. at 21a).

III.

THE LOWER COURT'S ERROR CAN BE REMEDIED BY SUMMARY REVERSAL OR SUMMARY REMAND.

The decision of the Court of Appeals clearly and directly conflicts with the policy articulated by this Court in *General Electric Co., v. Joiner, supra.* To correct the lower court's error, this Court should grant Certiorari and summarily reverse on the authority of its intervening decision. Sup. Ct. R. 16.1; *See, e.g., Helvering v. Wiese*, 292 U.S. 614 (1934).

If the Court determines that the result in this case is in conflict with Joiner, but that the Court of Appeals should be given an opportunity to address the issues raised by this Petition as they relate to the standard and scope of Appellate review, Petitioner urges the Court to grant Certiorari, summarily vacate the judgment below and remand the case to the Eighth Circuit Court of Appeals for reconsideration in light of the Joiner decision. *See Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (Per Curiam); *see, e.g., Kirwan v. Romano*, 425 U.S. 929 (1976); *Jonn Nuveen & Co. v. Sanders*, 425 U.S. 929 (1976); *Lash v. Aikens*, 425 U.S. 947 (1976); *Mathews v. Williams*, 424 U.S. 951 (1976). This Court recently confirmed that it "has the power to remand to a lower court any case raising a factual issue which is properly before us in an appellate capacity." *Lawrence v. Chater*, 516 U.S. 163, 116 S. Ct. 604, 605 (1996). The Court also expressed its willingness to summarily vacate and remand when

> . . . intervening developments . . . that we have reason to believe the Court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.

Id., 116 S. Ct. at 607. That is precisely the situation that has arisen in this case.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below summarily reversed. In the alternative, the petition should be granted, the decision of the Court of Appeals vacated, and the case remanded for further consideration in light of this court's decision in *General Electric Co. v. Joiner, supra.*

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED DECEMBER 5, 1997

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1147

Appeal from the United States District Court
for the District of Minnesota

Lois E. Jenson; Patricia S. Kosmach; Kathleen O'Brien Anderson, on their own behalf and on behalf of all others similarly situated;

Plaintiffs - Appellants,

Angel Alaspa; Shirley Burton; Audrey Daniels; Marilyn Greiner; Diane Hodge; Joan Hunholtz; Judy Jarvela; Mavie Maki; Michelle Mesich; Priscilla Robich; Debra Sersha; Marcia Steele; Marjorie Tolbert; Denise Vesel,

Appellants,

v.

Eveleth Taconite Company; Eveleth Expansion Company; Oglebay Norton Company; Oglebay Norton Taconite Company, doing business as Evelyth Mines; United Steelworkers of America, Local 6860,

Defendants - Appellees,

Appendix A

NOW Legal Defense and Education Fund,

Amicus Curiae,

National Employment Lawyers Association,

Amicus Curiae.

Submitted: October 21, 1997

Filed: December 5, 1997

Before McMILLIAN, FLOYD R. GIBSON and LAY, Circuit Judges.

LAY, Circuit Judge.

This case has a long, tortured, and unfortunate history. In August 1988, Lois Jenson and Patricia Kosmach filed a class action suit against Eveleth Mines[1] alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2, and the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363.03, subd. 1(2). Three years later, the district court certified a class of plaintiffs that includes those who have been employed at Eveleth Mines in Eveleth, Minnesota, after December 30, 1983. *See Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 667 (D. Minn. 1991) (*Jenson* I).[2]

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1. The named defendants are Eveleth Taconite Company, Eveleth Expansion Company, Ogelbay Norton Company, and Ogelbay Norton Taconite Company (collectively referred to as "Eveleth Mines").

2. Specifically, the district court defined the class to include:

(Cont'd)

Appendix A

On May 13, 1993, the district court found Eveleth Mines liable on plaintiffs' classwide claims of (1) sex discrimination in promotions to the position of "step-up foreman" and foreman, and (2) sexual harassment. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 889 (D. Minn. 1993) (Jenson II)[3] On July 29, 1993, in accordance with 42 U.S.C. § 2000e-5(f)(5) and Federal Rule of Civil Procedure 53, the court appointed a Special Master to consider the compensatory damages and punitive damages claims under the MHRA raised by sixteen female employees of Eveleth Mines.[4] The compensatory damages plaintiffs sought

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(Cont'd)

> all women who have applied for, or have been employed in, hourly positions at Eveleth Mines at any time since December 30, 1983, and who have been, are being, or, as a result of the operation of current practices, will be discriminated against with regard to the terms and conditions of their employment because of gender.

Jenson I, 139 F.R.D. at 667.

3. The district court concluded the plaintiffs did not prevail on their classwide claims relating to sex discrimination in hiring, job upgrades and assignments, compensation, training, hiring into craft positions, discipline and retaliation. *Jenson II*, 824 F. Supp. at 889. The district court dismissed those claims with prejudice. *Id.* The plaintiffs have not appealed that ruling.

4. In 1988, when plaintiffs filed this suit, Title VII limited remedies available under it to backpay, injunctions, and other equitable relief. *See United States v. Burke*, 504 U.S. 229, 238 (1992); 42 U.S.C. § 2000e-5(g). In 1991, Congress enacted 42 U.S.C. § 1981a, which allows plaintiffs to bring claims for punitive and compensatory damages against private defendants who intentionally violate Title VII. *See* Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a). However, the Supreme Court has held that § 1981a only applies to cases arising after its 1991 enactment. *See Landgraf v. USI Film Products*, 511 U.S. 244, 293 (1994).

included back pay, front pay, and damages for past and future mental anguish. *See* Minn. Stat. § 363.071, subd. 2 (administrative law judge may award damages for mental anguish); Minn. Stat. § 363.14, subd. 2 (allowing district court judge to award same relief).

The MHRA does not, however, define mental anguish. In his Report, the Special Master said mental anguish Includes mental suffering caused by painful emotions such as indignation, wounded pride, shame, public humiliation and despair. Report and recommendation, *Jenson V. Eveleth Taconite Co.*, Civ. 5-88-163 (D. Minn. Mar. 28, 1996), Appellants' Addendum at 65; *See also Black's Law Dictionary*, 985-86 (6th ed. 1990) (mental anguish includes mental sensation of pain resulting from emotions such as grief, severe disappointment, indignation, wounded pride, shame, despair and public humiliation). The Special Master thereafter allowed extensive discovery, took 7469 pages of testimony during a seven-week trial, and issued a 416-page Report and Recommendation. The Special Master awarded damages for mental anguish to various members of the class.[5] *See*

5. The Special Master rejected plaintiffs' attempt to divide their mental anguish claims into separate impairments such as loss of enjoyment of life and impairment of reputation. Appellants' Addendum at 65 n.14. The district court concurred in this ruling. We find no abuse of discretion or error at law in such a ruling. Plaintiffs have not pled a separate claim for defamation. To the extent that we understand plaintiffs' argument, we would agree that in evaluating damages for mental anguish, plaintiffs are entitled to have the trier of fact weigh evidence such as public humiliation, shame, and despair. Furthermore, if the emotional harm has caused an impairment to a plaintiff in living a normal life, this too can be evaluated as compensable damages. The Special Master acknowledged as much when he observed: "[m]ental anguish can interfere with work

(Cont'd)

Appellants' Addendum at 466-67.[6] Plaintiffs thereafter filed objections to the Special Master's Report. The district court affirmed the Special Master's Report and Recommendation. *See* Memo. Op. and Order, *Jenson v. Eveleth Taconite Co.*, Civ. No. 5 88-163 (D. Minn. Nov. 12, 1996), Appellants' Addendum at 46-47. This appeal followed.

On appeal, the plaintiffs generally attack the analysis and rationale the Special Master used in awarding damages. Plaintiffs also raise individual claims as to constructive discharge, the statute of limitations, whether one claim has survived one of the plaintiff's death, and the Special Master's failure to award punitive damages. We address these claims separately, *infra*. Plaintiffs assert the damages awards do not make the women

(Cont'd)
performance or cause physical, social, emotional or other stresses, alone or in combination." *Id.* However, as the Special Master ruled, these claims cannot serve as separate causes of action, especially when the plaintiffs did not plead them.

6. The specific awards were as follows: for Angel Alaspa the amount of $6,000; for Kathleen Anderson the amount of $20,000; for Shirley Burton the amount of $20,000; for Audrey Daniels the amount of $15,000; for Marilyn Greiner the amount of $25,000; for Joan Hunholz the amount of $5,000; for Judy Jarvela the amount of $20,000; for Lois Jenson the amount of $25,000; for Mavie Maki the amount of $5,000; for Michelle Mesich the amount of $18,000; for Priscilla Robich the amount of $2,500; for Deborah Ann Sersha the amount of $5,000; for Marcia Steele the amount of $6,000; for Marjorie Tolbert the amount of $7,000; and for Denise Vesel the amount of $3,000. The Special Master found that the claims of Diane Hodge were time barred, but in the event they were not, he recommended she be awarded $7,000. In addition, the Special Master recommended that Eveleth Mines pay a statutory penalty of $32.000 to the State of Minnesota, pursuant to Minn. Stat. § 363.071, subd. 2.

whole and are totally inadequate and shocking." We share plaintiffs' concern regarding the inadequacy of the damages. We are most concerned, however, with the Special Master's erroneous application of legal principles governing the award, and his restrictive rulings limiting the testimony of plaintiffs' expert witnesses. Therefore, we focus our analysis on these legal errors.

Although the defendant does not question liability on appeal, we briefly mention it for historical relevance to our review of the award of compensatory damages and the denial of punitive damages.[7] Any fair reading of the record requires this court to acknowledge that the sexual harassment conducted against the member class, individually and as a whole, is, to say the least, egregious. In certifying the class, Judge Rosenbaum summarized the preliminary evidence as follows:

> Sexually explicit graffiti and posters were found on the walls and in lunchroom areas, tool rooms, lockers, desks, and offices. Such material was found in women's vehicles, on elevators, in women's restrooms, in inter-office mail, and in locked company bulletin boards.
>
> Women reported incidents of unwelcome touching, including kissing, pinching, and grabbing. Women

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7. Under the current MHRA, punitive damages are limited to $8,500 per individual. Minn. Stat. § 363.071, subd. 2 (1996). The Special Master concluded that at the time plaintiffs filed their claim, the MHRA limited punitive damages to $6,000 per individual. Appellants' Addendum at 459; Minn. Stat. § 363.071, subd. 2 (1986). Plaintiffs do not dispute the Special Master's conclusion that $6,000 is the maximum amount of punitive damages available to them under the MHRA.

> reported offensive language directed at individuals as well as frequent "generic" comments that women did not belong in the mines, kept jobs from men, and belonged home with their children.

Jenson I, 139 F.R.D. at 663.

Judge Kyle, in finding liability, held that "Eveleth Mines engaged in a pattern or practice of maintaining [a work] environment sexually hostile to women." *Jenson II.* 824 F. Supp. at 888. The court found sexual harassment was a "standard operating procedure" at Eveleth Mines. *Id.* at 888. In finding Eveleth Mines liable for creating or condoning a hostile work environment, the district court found:

> [s]exual harassment at Eveleth Mines was so pervasive that an inference of knowledge arises. . . . In addition, many of Eveleth Mines' first-line supervisors had actual knowledge of the harassing behaviors: some foremen participated in them and others worked closely with those who did. Further, management personnel testified that they saw photos and graffiti of a sexual nature.

Jenson II. 824 F. Supp. at 887.

Judge Kyle made numerous findings regarding the nature of the working environment at Eveleth Mines. He found Eveleth Mines male-dominated in terms of power, position, and atmosphere. *Jenson II,* 824 F. Supp. at 879. Judge Kyle found that male-focused references to sex and to women as sexual objects created a sexualized workplace. *Id.* These references included graffiti, photos, and cartoons that male employees,

including bargaining unit and salaried employees such as foremen, displayed throughout Eveleth Mines. *Id.* at 879-880. Other references included "verbal statements and language reflecting a sexualized, male-oriented, and anti-female atmosphere." *Id.* at 880. Some male employees subjected female employees to physical conduct of a sexual nature. In one incident, a male employee pretended to perform oral sex on a sleeping female co-worker. *Id.* at 880. Other incidents involved men touching women in an objectionable manner. *Id.* Some women were presented with various sexual materials. *Id.* Judge Kyle concluded "the presence of sexual graffiti, photos, language and conduct . . . told women that the sex stereotypes reflected in and reinforced by such behavior were part and parcel of the working environment at Eveleth Mines." *Id.* at 884.

The district court concluded that "Eveleth Mines made no effort [to] eradicate the hostile environment existing within its facilities." *Id.* at 888. We emphatically reject the Special Master's conclusion in his Report that the fact that the culture of the Iron Range mining industry allowed sexual harassment is a mitigating factor for Eveleth Mines. *See* Appellants' Addendum at 461. Instead, we find this observation underscores the overall culpability of Eveleth Mines.

The Special Master's report reflects prodigious effort. Nonetheless, the Special Master's written findings contain numerous statements that lead us to question whether the Special Master fairly evaluated the plaintiffs' claims.[8] We make this observation to support our conclusion that on remand, the

8. Many of these comments are challenged by amici (National Organization of Women et al.) on the ground that the Special Master was guilty of gender bias. The plaintiffs do not raise a claim of gender bias, and thus, we do not address such a claim.

district court must approach the recorded testimony and any supplemental testimony on a *de nova* basis.

Our review and vacation of the district court's findings primarily turn on the Special Master's misapplication of legal principles regarding causation and admissibility of expert testimony. We review these conclusions of law *de nova. See Pullman-Standard v. Swift*, 456 U.S. 273, 290 n.19 (1982).

I. Causation

In his Report, the Special Master stated that "[a] sexual harassment case based upon a hostile work environment, not *quid pro quo*, is founded on principles of negligence and conventional rules of civil litigation, including the doctrine of proximate cause, apply." Appellants' Addendum at 67 (citing *Price Waterhouse v. Hopkins* 490 U.S. 228, 253 (1990); *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978); *Department of Human Rights v. Spiten,* 424 N.W.2d 815, 818 (Minn. Ct. App. 1988)). Plaintiffs claim the Special Master misapplied the burden of proof regarding the issue of causation. Confusion about the correct burden of proof set in at the early stages of discovery. Before trial, the defendants sought discovery of the personal background of each of the plaintiffs relating to events that allegedly affected plaintiffs' emotional well-being. Personal events defendants sought to discover included detailed medical histories, childhood experiences, domestic abuse, abortions, and sexual relationships, etc. The plaintiff class describes this as the "scorched earth" defense.

We would agree that much of the discovery (e.g., domestic abuse, earlier illnesses, and personal relationships, etc.) was not relevant or was so remote in time, that it should not have been

allowed. Plaintiffs sought protective orders, but the Special Master denied the requested orders. The Special Master appears to have based this denial, in part, on *Eveleth Mines' concession* that it had the burden of proof to show plaintiffs' various personal experiences outside of the work environment caused plaintiffs' emotional injuries. *See* Eveleth Mines' Memo. in Supp. of Defs.' Req. for Modification of Special Master's Order of May 31, 1994, *Jenson v. Eveleth Taconite Co.*, No. 5-88-163 (D. Mine. Aug. 24, 1994), Appellants' App. at 178; *Jenson v. Eveleth Taconite Co.*, Civ. No. 5-88-163, (D. Minn. Sept. 29, 1994) (order allowing comprehensive depositions of plaintiffs regarding their medical records). The concession arose from defendants' pleading that plaintiffs' injuries were caused by the conduct of "plaintiffs and/or others over whom [Eveleth Mines] had no control." Eveleth Mines' Answer at ¶15 & Eveleth Mines' Am. Answer at ¶20, *Jenson v. Eveleth Taconite Co.*, No. 5-88-163 (D. Minn. Sept. 6, 1988 & Mar. 31, 1989), Appellants' App. at 94, 127.

Somehow, and without explanation, between the time of discovery and the time of trial, the Special Master found it was *plaintiffs* who had the burden to show aggravation of a pre-existing condition, and that under Minnesota law "the damages recoverable are limited to additional injury directly caused by the aggravation." Appellants' Addendum at 88 (citing Minnesota Jury Instruction Guide 163; *Schore v. Mueller.* 186 N.W.2d 699 (1971); *Nelson v. Twin City Motor Bus Co.*, 58 N.W.2d 561 (1953)). The Special Master observed:

> [t]he issues inevitably raised are whether or not the total harm can be apportioned between two or more direct causes, and, if so, the ascertainment of the portion of harm which was caused by each of the

> direct causes. Both issues pose mixed questions of law and fact, and must be determined on evidence presented, but the evidence may be enhanced by an assumption that if the party bearing the burden of proof fails to produce evidence showing that the total damage is capable of reasonable apportionment between causes the issues will be resolved adversely to that party. If the "a*ggravation of a pre-existing disability*" or defect issue is raised as a defense, or by the defense as bearing upon reasonable damages, the burden of proof on *apportionment* rests on defendant. If, however, the issue is raised by plaintiff, the burden of proof rests upon plaintiff. *See Marshall v. Galvez*, 480 N.W.2d 358, 362 (Minn. Ct. App. 1992). *Here, the issue was raised by plaintiffs, and plaintiffs were impressed with the burden of proving that total damage can be reasonably apportioned.* Plaintiffs have offered no evidence on this issue, and, consequently, the contention must fail for lack of proof.

Appellants' Addendum at 88-89 (emphasis added).

In affirming the Special Master, the district court concluded the Special Master did not commit clear error in finding "[p]laintiffs had raised the question of [*aggravation of pre-existing condition*] and had not borne the burden of proving that the pre-existing condition and the total damage could be sorted out." Appellants' Addendum at 34-35 In this regards, the district court erred.

It is fundamental that a party pleading a claim or defense has the burden of proof to establish that claim or defense. *See*

Fed. R Civ. P. 8 (requirements for pleading claims and defenses); Fed. R. Civ. P. 9 (requirements for pleading special matters). Neither the Special Master nor the district court relate how the plaintiffs ever asserted or pled aggravation of a pre-existing condition. Indeed, it appears plaintiffs made no such claim. As such, plaintiffs bear no burden to prove apportionment.

Apportionment of damages is akin to an affirmative defense.[9] Moreover, apportionment may only be asserted when damages are divisible. *See Mitchell v. Volkswagenwerk, A.G.* 669 F.2d 1199, 1206 (8th Cir. 1982); *Canada v. McCarthy.* 567 N.W.2d 496, 507 (Minn. 1997), Restatement (Second) of Torts § 433A (1965).[10] The Special Master found, as a matter

9. *Apportionment* arises when two or more causes have combined to bring harm to a plaintiff. *See* Restatement (Second) of Torts § 433A (1965). A defendant availing itself of apportionment seeks to limit its liability by showing that although its conduct was a substantial factor in harming plaintiff, that conduct only caused part of plaintiff's harm. *See id.* The defendant seeks to limit its liability to that [divisible] portion of plaintiff's harm that the defendant actually caused.

The *single indivisible injury* rule imposes joint and several liability when two or more persons acting independently cause harm to a third person through consecutive acts of negligence closely related in point of time. *Canada v. McCarthy,* 567 N.W.2d 496, 507 (Minn. 1997) (citing *Mathews v. Mills,* 288 Minn 16, 20-21, 178 N.W.2d 841, 844 (1970)). If the harm is indivisible, each actor is liable for the entire harm. If the harm is divisible, the actor asserting division may be able to limit its liability to damages for the harm it caused plaintiff. *See id.*

10. This rule generally applies when joint tortfeasors cause a plaintiff's damages and also when innocent forces combine with the conduct of a tortfeasor to contribute to a plaintiff's overall harm. *See Rozark Farms. Inc. v. Ozark Border Elec. Coop.,* 849 F.2d 306, 310 (8th Cir. 1988) (citing Restatement (Second) of Torts § 433A cmt. a (1965)).

of law, there was no showing that *any damages* the plaintiffs suffered were divisible. *See* Appellants' Addendum at 84. This finding should have foreclosed the ability of the defendant to apportion damages. However, the Special Master did not follow this reasoning.

Although it is not clear, it appears the Special Master reasoned that plaintiffs failed to show the *extent of harm caused by Eveleth Mines* in contrast to past emotional harm caused by other emotional experiences. We can think of no other purpose for the Special Master's exhaustive discussion of plaintiffs' personal backgrounds. On this basis, the Special Master appears to have reduced the damages awarded to the plaintiffs on the ground that plaintiffs failed to apportion (i.e., separate) their overall harm. Under the record presented, it is difficult to understand why plaintiffs would attempt to urge any *apportionment* of damages. More importantly, they did not have the duty to do so.

Obviously, if this was the Special Master's rationale, it misapplies the *doctrine of apportionment*. Assuming the doctrine is applicable, it is the *defendant* who must prove that any damage caused by other factors was divisible, and if so, what portion of damages the defendant caused. *See Mitchell,* 669 F.2d at 1206; *Canada* 567 N.W.2d at 507; Restatement (Second) of Torts a 433A. Plaintiffs were required to show that defendants' sex discrimination and sexual harassment were substantial factors in causing their e*motional harm*. The Special Master's individually wards of damages to plaintiffs indicates plaintiffs made this showing. However, what the plaintiffs did not have to prove was that other factors did *not* contribute to that harm. To limit its liability through apportionment, a defendant must prove that a plaintiff's damages are *divisible*, and other outside

factors contributed to the plaintiff's harm. This the defendants were required to do; this the defendants failed to do.

Plaintiffs argue that Eveleth Dyes must take the plaintiffs as it found them. Plaintiffs' position arises from Eveleth Mines' failure to prove that plaintiffs' injuries were an aggravation of a pre-existing condition. Here, although the Special Master erroneously placed the burden regarding aggravation of a pre-existing condition on the plaintiffs, the Special Master ultimately found *no pre-existing condition* was proven. *See* Appellants' Addendum at 88-89. Once the Special Master determined this, as a matter of law, the universal doctrine of tort law that a tortfeasor must take the plaintiff as it finds her should apply. *See* Restatement (Second) of Torts §§ 433A cmt. i, 461 cmt. a.

The Special Master concluded that the "Restatement clearly limits the doctrine to cases involving a pre-existing 'physical condition.' " Appellants' Addendum at 87 (citing Restatement (Second) of Torts § 461 cmt. a). Although he noted some courts have extended the doctrine to underlying emotional instability, and neither the Eighth Circuit nor the Minnesota Supreme Court have spoken directly to the subject, the Special Master declined to apply the doctrine to non-physical conditions. *See* Appellants' Addendum at 87. We disagree with the Special Master's conclusion.

The "eggshell skull" principle plaintiffs assert is simply another way of stating that foreseeability is not an element of proximate cause. *See Christianson v. Chicago. St. Paul. Minneapolis & Omaha Ry. Co.*, 69 N.W. 640, 641 (Minn. 1896). In Minnesota, it is well settled that a tortfeasor is liable for all of its natural and proximate consequences. *See Dellwo v.*

Pearson, 107 N.W.2d 859, 861 (Minn. 1961); *Christianson.* 69 N.W. at 641. In other words, foreseeability does not limit an award of money damages. This includes damages assessed against a tortfeasor for harm caused to a plaintiff who happens to have a fragile psyche. *See McKinnon v. Kwong Wah Restaurant,* 83 F.3d 498, 506 (1st Cir. 1996) (defendant must "take the victim as [defendant] finds [the victim], extraordinarily sensitive or not"); *Wakefield v. NLRB,* 779 F.2d 1437, 1438 (9th Cir. 1986) (administrative agency held that plaintiff's predisposition towards mental illness relieved defendant of responsibility for plaintiff's psychological disability, ignoring "time-honored legal principle" that a wrongdoer takes a victim as the wrongdoer finds the victim); *Shimman v. Frank.* 625 F.2d 80, (6th Cir. 1980) (defendant liable for plaintiff's psychological injury where the "personality structure" of plaintiff, who was victim of intentional beating, may have made plaintiff more vulnerable to psychological harm); *Thames v. Zerangue,* 411 So.2d 17, 19-20 (La. 1982) (tortfeasor takes plaintiff as he or she finds plaintiff even though plaintiff had a history of emotional problems); *Freyermuth v. Lutfy,* 382 N.E.2d 1059, 1064 & 1064 n.5 (Mass. 1978) (defendant liable for tortious conduct that reactivated plaintiffs dormant mental illness); *McBroom v. State,* 226 N.W.2d 41, 45-46 (Iowa 1975) (applying rule that tortfeasor takes victim as tortfeasor finds him to victim whose status as a prisoner predisposed him to greater psychological harm from a physical injury). *But see Munn v. Algee,* 924 F.2d 568, 576 (5th Cir. 1991) (stating that "eggshell skull" doctrine has only been applied to pre-existing *physical* conditions and declining to extend the doctrine's scope absent indication that the Mississippi state courts would also do so).

In conclusion, we find that by whatever synergistic reasoning utilized, the Special Master did not apply proper

principles of causation to plaintiffs' claims of emotional harm. We believe the Special Master's erroneous approach played a significant and unfortunate role in limiting plaintiffs' damages. Moreover, as we now discuss, we find the court unduly limited the testimony and opinion evidence of plaintiffs' experts relating to that damage.

II. Expert Testimony

The Special Master excluded the testimony of plaintiffs' expert witnesses regarding causation. The psychiatrists and psychologists called by the plaintiffs possess reputable backgrounds of education and experience in their respective fields. The six medical experts called by the plaintiffs were Dr. Carol Novak, Dr. Claire Bell, Dr. Donald Mayberg, Dr. Randall Lakosky, Dr. Raymond Sampson, and Dr. Kent Newman.

Dr. Novak received her M.D. from the University of Minnesota in 1983, and has been a licensed psychiatrist in the state of Minnesota since 1985. She is a diplomat of the American Board of Psychiatry and Neurology, certified in the specialty of psychiatry, and a diplomat of the National Board of Medical Examiners.[11] Before testifying in this case, she had diagnosed and treated more than 2,500 patients.

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11. The court refused to allow Dr. Novak to testify: as to whether the Diagnostic Statistical Manual directs that it is to be used in conjunction with clinical judgment; why it is important to determine the cause of a mental disorder, whether there are different categories of causes that bring about mental disorders, or whether as part of her diagnosis she must decide if a particular category of causes led to a mental disorder, Trial Tr. Vol. XXII at 204-10; as to what kind of behavior [such as sexual harassment] she looked for to diagnose Post Traumatic Stress Disorder (PTSD), Trial Tr. Vol. XXIV at 22-27; as to whether she had any preconceived ideas regarding

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Appendix A

Dr. Bell received her Psy. D. in clinical psychology from Baylor University in 1979 and is a licensed psychologist in the state of Minnesota. In 20 years of practice, she has diagnosed and treated more than 2,000 patients, and has conducted forensic exams in at least 800 cases.[12]

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her findings on causation, or whether the plaintiffs PTSD was chronic or acute, *Id.* at 46-48; as to what symptoms of PTSD were experienced by the plaintiff during the time she was working at the mines, and whether the symptoms the plaintiff was now experiencing could have been caused by a rape when the plaintiff was 19 years old, *Id. at 52-54*; as to what symptoms the plaintiff displayed that were specifically related to sexual harassment, *Id.* at 72-73; or as to whether she had identified symptoms that were associated with traumatic events of sexual harassment that led to a diagnosis of anxiety disorder, *Id.* at 99-100.

In one instance, the court bluntly stated: "There's no accepted method for assigning weight to a particular stressor as a causative factor when [there is] more than one stressor . . . Insofar as [Dr. Novak's proffered opinion on causation, on disability and in prognosis this Court finds that it fails to meet the requirements in Rule 702 and to that extent it is disallowed as nonadmissable" Trial Tr. Vol. XXIV at 2271-73.

12. The court refused to allow Dr. Bell to testify: as to specific symptoms that produce emotional distress, on the grounds that the testimony goes to causation, Trial Tr. Vol. XXV at 22-23; as to the process of isolating events that may produce trauma, whether she considered prior seeking of psychological treatment an indicator of psychological distress, or whether she attempted to isolate potential stressors in determining the degree of their contribution, *Id.* at 43-47; as to whether she relied upon her understanding of sexual harassment "in isolating any of the potential stressors for the claimants in this case," *Id.* at 60, as to what "risk factors" make an individual more
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Appendix A

Dr. Mayberg received his M.D. from the University of Minnesota in 1952, and is a licensed psychiatrist in the state of Minnesota. Since 1980 he has worked as a clinical professor at the University of Minnesota's Department of Psychiatry. He is a diplomat with the American Board of Psychiatry and Neurology, certified in the specialty of psychiatry, and has diagnosed and treated more than 35,000 patients.[13]

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susceptible to PTSD, *Id.* at 69-71; as to whether, in her experience, she ever made a diagnosis based on symptoms or conditions occurring in the past; *Id.* at 113; as to what events she considered to be contributing to the diagnosis of anxiety disorder, whether she ruled out any other potential contributing factors of the source of the diagnosis, or whether an abusive family history had any effect on the condition of the plaintiff, *Id.* at 151-53; as to whether psychologists are capable of making a diagnosis regarding psychological factors affecting physical conditions, or whether she had made such a diagnosis in the past, *Id.* at 159-60; as to what specific events she considered to be contributing factors to her diagnosis of PTSD, *Id.* at 163; as to whether she had an opinion about whether the plaintiff suffered a psychological harm as a result of her exposure to harassment at the mines, *Id.* at 184; as to what part the "family of origin circumstance" played in the plaintiff's psychological symptoms, Id at 209-13; as to her opinion regarding the contributing factors to the plaintiff's illness, *Id.* at 214-15; and as to whether an incident in which the plaintiff had rocks fall on her at the mine related to any of the PTSD symptoms, Trial Tr. Vol. XXVI at 31-32.

13. The court refused to allow Dr. Mayberg to testify: as to whether he, as a psychiatrist, could "determine the cause of a psychiatric . . . disorder or psychiatric symptoms in a forensic setting." Trial Tr. Vol. XXII at 19; as to whether "the literature in the mental health field [has] identified sexual harassment in particular
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Appendix A

Dr. Lakosky received his M.D. in 1963 and became a certified psychiatrist by the American Board of Psychiatry and Neurology in 1973. He has served as a medical director of the Ramsey County Community Mental Health Center in St. Paul, Minnesota, the Range Mental Health Center in Hibbing, Minnesota, and the Minnesota Department of Human Services. Dr. Sampson received his Ph.D. in counseling psychology from the University of Houston in 1974, and is a licensed psychologist in the state of Minnesota. He is board certified through both the American Board of Professional Psychology and the American Board of Psychological Hypnosis. Dr. Newman received his Ph.D. in psychology in 1977 and has been a licensed psychologist in the state of Minnesota since 1983. Since 1984 he has conducted hundreds of psychological examinations for the Social Security Administration, relating to psychological disability claims.

Without need to further elaborate on the record, we find the trial court erred in restricting and rejecting the testimony of

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as a cause of mental disorders." *Id.* at 25-26; as to whether physical reactions to harassment are the kind of symptoms he would use in his diagnostic methodology, whether particular symptoms fit into the diagnostic methodology, or whether sexual harassment in the workplace is recognized as a "stress;" *Id.* at 31-41; as to which symptoms directed him to particular stresses in his methodology, and whether the symptoms caused by the stresses are the criteria for diagnostic purposes in his methodology, *Id.* at 117-18; as to his conclusions regarding the stresses the plaintiff was experiencing or the behavior she was exhibiting, to his opinion on the plaintiff's prognosis, or to any other stressors on the plaintiff, other than those listed in the expert's report, *Id.* at 171-73; that "there is a relationship between the experiences in the mine of 1984 and the present," and as to whether plaintiff's physical symptoms are still present, *Id.* at 207-09.

these expert witnesses. The Special Master made two questionable observations which we believe are at the root of his rulings excluding the opinions of plaintiffs' expert witnesses. First, the court found: "There is, therefore, no scientifically developed psychiatric model or procedure for determining whether a particular stress caused a particular symptom or mental state." Appellants' Addendum at 83. Second, the court, perhaps misled by its erroneous application of principles of causation, found:

> The evidence establishes that, while working at Eveleth Mines and previously, most of the claimants were subjected to outside stresses or trauma, or suffered from emotional problems, which could have had psychological impact and caused symptomatology. No one advanced a validated theory which furnishes a scientific basis for distinguishing between the causal effect of multiple psychological stresses or trauma, or for assigning relative impact or degree of impact to different trauma or stresses. This Court is persuaded by unanimous testimony of psychiatrists and psychologists, called by both sides, that there is no scientific method for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists.

Id. at 83-84.

The Special Master rejected all opinion evidence proffered by the plaintiffs' experts. *See id.* at 84. Ironically, the Special Master, notwithstanding the above observation, generally

accepted the opinions of the expert witnesses produced by the defendants.[14] The imbalance in its rulings is difficult to explain.

The Special Master viewed the psychiatric proof as to causation of mental harm and prognosis as being incompetent. Without the ability to offer expert testimony regarding causation, the plaintiffs were denied the ability to meet the burden of proof assigned to them in regard to their emotional damage.

Upon a reading of the record, ineluctably we are led to conclude that the Special Master's exclusion of this testimony did not rest upon any recognized area of discretion. The record strongly suggests the Special Master foreclosed consideration of the evidence based on his own preconceived notions relating to psychiatric proof. The Special Master did not attempt to hide his hostility toward psychological evidence in sexual harassment claims, stating: " 'Experts' . . . know no more than judges about what causes mental changes — which is to say that they know almost nothing." Appellants' Addendum at 84 (quoting *Bohen v. City of East Chicago,* 622 F. Supp. 1234, 1243 n.4 (N.D. Ind. 1985), *rev'd on other grounds* 799 F.2d 1180 (7th Cir. 1986)).

To the extent the Special Master relied upon *Daubert v. Merrell Dow Pharmaceuticals. Inc.*, 509 U.S. 579 (1993) to support his rulings, we find his rulings to be in error.[15] In

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14. *See* Appellants' Addendum at 117-18, 165-69, 191-92, 218-19, 228-29, 259-63, 277-78, 328-32, 362-63, 376-78, 391, 410-11, 432-35.

15. At the time of this writing, the Supreme Court was considering the question of the appropriate standard of appellate review for trial court decisions excluding expert testimony under

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Daubert, the Supreme Court addressed the standards of admissibility for specific evidence under Federal Rules of Evidence 702.[16] There is some question as to whether the *Daubert* analysis should be applied at all to "soft" sciences such as psychology, because there are social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies. *See Daubert*, 509 U.S. at 590 n.8 ("Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here."). However, the question of whether *Daubert* should be applied to the psychological evidence excluded here does not affect our ruling in this case, because we find that under either *Daubert* or under the more general parameters of Rule 702, the proffered testimony was both reliable and relevant, and should have been admitted into evidence.

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Daubert. See Joiner v. General Elec. Co., 78 F.3d 524 (11th Cir. 1996), *cert. granted*, __ U.S. __ , 117 S.Ct. 1243 (1997). However, even under a restrictive "abuse of discretion" standard, we find that the Special Master erred as a matter of law in excluding expert testimony on causation. Therefore, resolution of the standard of review question in *Joiner* does not affect our decision in this case.

16. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to detennine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Appendix A

In *Daubert,* the Court rejected the general acceptance test for novel scientific evidence from *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), and provided more flexible guidelines for admissibility of scientific evidence under Rule 702. The trial judge is charged with a "gatekeeping" role to ensure that all scientific testimony or evidence admitted is both reliable and relevant. *Daubert.* 509 U.S. at 589 n.7, 597. The Court emphasized that an expert must testify as to scientific knowledge. Such knowledge "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Id.* at 590. This knowledge must "assist" the trier of fact. *Id.* at 591. In other words, the scientific knowledge must be relevant to the issue before the court. In order to determine whether the scientific reasoning is valid under *Daubert* and whether that reasoning can be applied properly to the facts at issue, the trial court is to consider factors such as whether the reasoning: 1) can be and has been tested, 2) has been subjected to peer review, 3) has a known or potential rate of error, and 4) has been generally accepted by the scientific community. *Id.* at 593-94. The *Daubert* court stressed that "many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." 509 U.S. at 593. It is clear the Court did not intend for a trial judge to automatically exclude relevant evidence if one of these conditions was not fully satisfied.

The record indicates the opinion evidence offered by the plaintiffs' expert witnesses was thorough and meticulously presented. The methodology for arriving at their opinions was laid out clearly by each witness. The key question in this damages phase of the trial was the causal link between the actions of the defendants and the claimed emotional injuries of the plaintiffs. The expert testimony was therefore without doubt relevant to the issue before the court.

For these reasons, we find that the *overall testimony* was erroneously excluded under Rule 702 of the Federal Rules of Evidence and established precedents of this court. "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony." *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 283 (8th Cir.), *cert. denied.* __ U.S. __, 116 S. Ct. 84 (1995) (quoting *Fox v. Dannenberg*, 906 F.2d 1253,1256 (8th Cir. 1990)). The rule clearly "is one of admissibility rather than exclusion." *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir.), *cert. denied*, 502 U.S. 913 (1991); *Fox*, 906 F.2d at 1256; *see also Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989) ("A trial court should exclude an expert opinion only if it is so fundamentally unsupported that it cannot help the factfinder."). This court has cautioned that "*blanket evidentiary exclusions* can be especially damaging in employment discrimination cases," *Estes v Dick Smith Ford. Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988), and has disapproved such *categorical exclusions* by the same Special Master in a prior sexual harassment case which "unfairly prevented" proof of plaintiff's claim. *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155-56 (8th Cir.), *cert. denied.* 498 U.S. 854 (1990).

In affirming an award of compensatory damages to a victim of sex discrimination, this court and others recently have noted the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress. *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 1692 (1997); *see also Webb v. Hyman*, 861 F. Supp. 1094, 1114 (D. D.C. 1994) (psychologist testified that harassment caused plaintiff's mental harm by bringing out deeply repressed emotions relating to her childhood abuse); *Alberts v. Wickes Lumber Co.*, 69 Fair Empl. Prac. Cas. (BNA) 304, No. 93C 4397,1995 WL 557473 (N.D.

Ill. Sept. 15, 1995) (admission of expert proof that harassment caused plaintiff's panic disorder and countervailing proof from defendant); *Hurley v. Atlantic City Police Dep't*, 933 F. Supp. 396, 424 (D. NJ. 1996) (expert proof showed mental harm including adjustment disorder caused by sexual harassment). The psychological proof presented by the plaintiffs in this case clearly possessed enough probative value to be admitted for consideration by the court.

In summary, our review of the record leads us to conclude that the testimony of plaintiff class' expert witnesses, who were well-qualified, should have been admitted into evidence. In doing so and in our remand, we emphasize that the weight and credibility of this evidence is left to the trier of fact, which in this case is the district court. However, there is little doubt that exclusion of such evidentiary proof could appreciably affect the damages awarded to the plaintiff class.

We now turn to the other claims raised on appeal by the plaintiff class.

III. Constructive Discharge Claims

During the damage phase of this litigation, plaintiffs Alaspa, Anderson and Jenson sought compensatory damages in the form of lost wages. The Special Master treated these damages claims as claims of constructive discharged.[17] The Special Master

17. The exact procedural posture of these claims is unclear from the record. At the time the first amended complaint was filed, all of these women were still working at the mines. The constructive discharge claims apparently were raised between the completion of the district court's *Jenson II* decision and the damages phase trial before the Special Master. Eveleth Mines points out that the plaintiffs (Cont'd)

concluded: (1) plaintiffs failed to prove the working conditions and Eveleth Mines' conduct actually caused them to resign; and (2) plaintiffs' evidence of future lost wages was too speculative to allow recovery. The district court affirmed, without discussion, the Special Master's conclusions of law and findings of fact rendered in connection with these claims. Appellants' Addendum at 44. We reverse and remand this issue to the district court for reconsideration.

We find the Special Master did not apply the appropriate burden-shifting principles in its analysis of the constructive discharge claims. Specifically, the Special Master failed to place the burden of proof on Eveleth Mines to show that the plaintiffs' resignations were *not* caused by the hostile working environment once the Special Master determined the individual plaintiff had established the requisite subjective element of their hostile environment claim.

In *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court set forth the burden-shifting

(Cont'd)

never pled their constructive discharge claims and the same were not litigated by consent. Appellees' Br. at 43, n.60. The Special Master noted that Anderson "did not advance a formal claim of constructive discharge which could have been considered prior to trial. . . ." Appellants' Addendum at 184, n.151. He also noted that consideration of Anderson's claim during the damages phase was "suspect." *Id.* The complaint does allege on behalf of the class damages in the form of back and front pay. The Special Master concluded that the plaintiff class did not need to file a new complaint for the damages earlier pled by the class. Regardless of their origin, the lost wage claims arising out of the hostile environment are part of the alleged compensatory damages and were properly before the Special Master.

standards to be used in a Title VII class action. Under *Franks*, the class action plaintiffs bear the burden of proving their prima facie case of sex discrimination during the liability phase of the litigation. Once proven, the burden of proof shifts to the defendant in the remedial phase to show the adverse employment action was not the product of discrimination. This court has explained that in an action involving both class claims and individual claims, where a finding has been made of classwide discrimination, the district court is required to use the *Franks* burden-shifting analysis to resolve both types of claims. *See Craik v. Minnesota State Univ.*, 731 F.2d 465, 481 (8th Cir. 1984).

The district court originally recognized that the *Franks* burden-shifting analysis applied to the individual claims for constructive discharge in its Order dated December 22, 1994. Then, the district court stated:

> In light of the Court's holding that the class had successfully established a pattern or practice of hostile environment sexual harassment, it appears that the burden-shifting analysis of *International Bhd. of Teamsters* should apply. Thus, Jarvela and Mesich need only establish that they were "potential victims of the proved discrimination" in order to shift the burden of persuasion onto Eveleth Mines to show that it is more likely than not that their decision not to return to work at the mines was the product of the hostile work environment.

Jenson v. Eveleth Taconite Co., Civ. No. 5-88-163, at 12 (D. Minn. Dec. 22, 1994) (order granting partial summary judgment.) (citations omitted).[18]

The district court's reasoning applies equally well to the lost wage claims of Alaspa, Anderson and Jenson.

Applying the *Franks* framework to this case, to make a prima facie case the three plaintiffs have the burden of showing that the working conditions at the mine were so intolerable that they were compelled to resign. *See Gartman v. Gencorp. Inc.* 120 F.3d 127, 129-30 (8th Cir. 1997); *Allen v. Bridgestone/ Firestone, Inc.*, 81 F.3d 793, 796 (8th Cir. 1996). The district court already had found that an extremely hostile work environment existed at the mines. *See Jenson II*, 824 F. Supp. at 887. We believe the district court's findings in *Jenson II* show that the working conditions at the mines were so hostile as to be intolerable.

In the damages phase, the plaintiffs still were required to show they were as affected by that hostile environment as a reasonable woman would be affected. *See Jenson II*, 824 F. Supp. at 876. However, once they made that showing, the burden of proof shifted to Eveleth Mines to show that it was more likely than not that their decision to not return to work was not the product of the hostile work environment. On this basis, these claims for economic loss are remanded to the district court to be calculated under the proper burden-shifting principles.

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18. The district court concluded Mesich and Jarvela could not maintain constructive discharge claims because both women had been absent from work for significant periods of time prior to and at the time each resigned. Mesich and Jarvela do not appeal this finding.

Appendix A

The Special Master also erred in finding that the evidence of lost wages was too speculative to allow recovery. The Special Master had at his disposal the testimony of both the plaintiffs' expert witness, Dr. Edward Foster, and the defendants' expert witness, Dr. Elizabeth Gunderson. Though the experts based their methodologies for calculating future lost wages on different assumptions, both models of calculations were available to the Special Master to estimate plaintiffs' damages. The Special Master refused to make such an estimate, stating:

> [A]n academic exercise which merely provides a partial pattern into which a court must insert figures and resolve questions on an intuitive basis lacks logical nexus between the expert's calculation and the facts of the case and is not sufficient to discharge plaintiff's burden of proving wage loss through evidence which is more than speculative.

Appellants' Addendum at 131-32.

At the same time, the Special Master regarded Dr. Gunderson's methodology to be "personalized and realistically pragmatic," Appellants' Addendum at 130, but refused to use Dr. Gunderson's methodology because plaintiffs did not provide the Special Master with sufficient facts in which to form an estimate.

We find the Special Master abrogated his fact-finding duties by refusing to use either Dr. Foster's or Dr. Gunderson's methodology to calculate lost wages. The Special Master did not provide any valid reasons for not using one of the two alternative formulations before it to estimate the plaintiffs' damages.

IV. Punitive Damages

All plaintiffs asserted claims for punitive damages against Eveleth Mines under state law. The MHRA allows a plaintiff to seek punitive damages under Section 549.20 for a violation of the MHRA. The pre-1990 Section 549.20, subd. 1, provided: "Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." Minn. Stat. § 549.20, subd. 1 (1988).

The Special Master concluded plaintiffs had failed to prove, by clear and convincing evidence, that Eveleth Mines should be held vicariously liable for the acts of its employees.[19] Under Section 549.20, subd. 2, a principal may be held liable for punitive damages based on the acts of its agents if (1) the agent worked in a managerial capacity and acted in the scope of employment, or (2) the principal ratified or approved of the acts of the agent. The Special Master found plaintiffs failed to submit sufficient evidence to identify which managers at Eveleth Mines knew of the discriminatory acts. Appellants' Addendum at 455-56. He also found the foremen who sexually harassed the plaintiffs or who knew of the harassment were not "managerial employees" and therefore Eveleth Mines could not be held vicariously liable for their actions. *Id.* at 455. We find the Special Master erred as a matter of law by examining the plaintiffs' punitive damages claims under the vicarious liability standard in § 549.20, subd. 2. Given the posture in which the case was presented to the Special Master, we hold the appropriate legal standard for the plaintiffs' punitive damages claims is the direct liability standard of § 549.20, subd. 1.

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19. The district court, with apparent reservation, affirmed the Special Master's findings. Appellants' Addendum at 41.

Appendix A

In *Jenson II,* the district court found Eveleth Mines violated Title VII and the MHRA by engaging in "a pattern or practice of discriminating against women in promotions to step-up foreman," 824 F. Supp. at 874, and "a pattern or practice of maintaining an environment sexually hostile to women." *Id.* at 888. This type of systemic discrimination has been defined as:

> Employment policies or practices that serve to differentiate or to perpetuate a differentiation in terms or conditions of employment of applicants or employees because of their status as members of a particular group. . . . Systemic discrimination . . . concerns a recurring practice or continuing policy rather than an isolated act of discrimination.

Lindemann & Grossman, *Employment Discrimination Law* 1142, n.258 (3rd ed. 1996) (quoting 1 Aff. Action Compl. Man. (BNA) § 2:0005.)

Only an employer can commit this type of discrimination. In *Jenson II,* the district court determined that the wrongful act at issue was not the individual harassing acts of the employees at the mine, but rather Eveleth Mines' pattern and practice of discriminating against women and maintaining a hostile working environment.

The Special Master mistakenly believed plaintiffs had to impute the "wilful indifference" of the supervisory employees to Eveleth Mines. Appellants' Addendum at 454. The district court found that Eveleth Mine had maintained a sexually hostile working environment both before and during the class period,

spanning in total eighteen years.[20] Jenson II, 824 F. Supp. at 877-78, 888. The sexual harassment occurring at the mines was so common, continuous and pervasive that Eveleth Mines knew or should have known of the problems. *Id.* at 887. In fact, the district court found first-line supervisors had actual knowledge of the harassment. *Id.*

The district court found that notwithstanding such knowledge, Eveleth Mines took no meaningful action to remedy these problems. *Id.* at 888. The defendants failed to investigate whether the sexual harassment complaints lodged were indicative of a larger, company-wide problem. *Id.* at 887. The court also found that Eveleth Mines did not implement a system for handling sexual harassment complaints. *Id.* Eveleth Mines did not attempt to remove or control the display of sexually offensive visual materials, even though management knew of its existence. *Id.* Finally, Eveleth Mines never tried to speak with the male employees about what is considered unacceptable conduct in the workplace. *Id.* at 888. The district court concluded that

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20. In so doing, we note the Special Master stated that Eveleth Mines' legal obligation to recognize and respect a female employee's right to work in an harassment-free environment did not arise until 1986 when the Supreme Court issued its decision in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). As plaintiffs point out, the Minnesota Supreme Court stated in 1980 that it was illegal for an employer to maintain a sexually hostile working environment. *See Continental Can Co., Inc. v. State*, 297 N.W.2d 241, 249 (Minn. 1980). More importantly, Title VII has made an employer's discrimination against an employee on the basis of sex an unlawful employment practice since its passage by Congress in 1964. The Special Master also found that Eveleth Mines had acted reasonably in light of the historical and existing culture of the Iron Range. Appellants' Addendum at 461. This conclusion directly contradicts the *Jenson II* decision holdings discussed above.

"Eveleth Mines failed to take prompt remedial action to alleviate the hostile environment," *id.*, and thereby facilitated the hostile environment. The district court observed: "It is undisputed that, aside from the policy statement in the CBA [collective bargaining agreement], Eveleth Mines has not made any effort to control or prevent, on company-wide basis, acts of sexual harassment." *Jenson II,* 824 F. Supp. at 888, n.96.

Whether an award of punitive damages is appropriate is, in essence, a factual determination. Therefore, we remand the punitive damages claims for reconsideration under the appropriate legal standard set forth in Section 549.20, subd. 1.

V. Statute of Limitation — Diane Hodge

When the plaintiff class was certified in *Jenson I*, the district court determined that the class shall consist of "all women who have applied for, or have been employed in, hourly positions at Eveleth Mines at any time since December 30, 1983" and have been discriminated against because of their gender. 139 F.R.D. at 667.

Eveleth Mines hired Diane Hodge in 1977. She was laid off by the company in July 1983, but returned to work five years later in July 1988. Plaintiffs argue that, like the other claimants, Ms. Hodge was a victim of the sexually hostile work environment maintained by the defendant and is entitled to compensation. However, the Special Master denied recovery to Ms. Hodge, ruling that because the majority of the harassing behavior directed toward her took place prior to December 30, 1983, her hostile work environment claim was time barred. *See* Appellants' Addendum at 243-44. Ms. Hodge testified that prior to 1983 she was regularly subjected to sexually explicit language

and graffiti, dirty jokes and adult magazines in the workplace. She testified that in 1978 or 1979 a step-up foreman grabbed her breasts, groped her, and made other sexual advances. During the same time period, another step-up foreman made sexual remarks and suggestions to her. In 1980, Ms. Hodge testified, she worked for another foreman who would constantly subject the crew to stories of his sexual exploits. *See* Trial Tr. Vol. XIII at 203-40.

Normally, liability cannot be based upon evidence of sexual harassment which occurred prior to the commencement of the class period, which in this case began on December 30, 1983. *See Hervey v. City of Little Rocks* 787 F.2d 1223, 1229 n.5 (8th Cir. 1986). However, in *Jenson II,* the district court directed that evidence of sexual harassment prior to commencement of the class period would be considered under a "continuing violation theory," which permits a court to consider alleged discriminatory acts occurring prior to the statutory limitation period for Title VII actions. 824 F. Supp. at 877; *see Chaffin v. Rheem Mfg. Co.,* 904 F.2d 1269, 1271 (8th Cir. 1990); *Gardner v. Morris;* 752 F.2d 1271, 1279 (8th Cir. 1985); *Satz v. ITT Fin. Corp.* 619 F.2d 738, 744 (8th Cir. 1980).

The Special Master's ruling denying recovery to Ms. Hodge was based on his finding that her claim could not be established as a continuing violation, because any "objectional conduct" she experienced during the class period was "an isolated incident" and "unrelated temporally or factually to acts of discrimination evidencing a hostile work environment. . . ." Appellants' Addendum at 244. Ms. Hodge testified that in 1992 she was humiliated and degraded when a foreman came up to a truck in which she and a male employee were sitting and asked if she and the worker were having sex. Trial Tr. Vol. XIII at 253-54.

Upon review of the record, we find the Special Master reached this conclusion by disregarding the district court's ruling in *Jenson II*, and incorrectly applying the continuing violation theory under the law of this circuit.

In finding the continuing violation theory should be applied in this case, the *Jenson II* district court stated: "In the arena of sexual harassment, particularly that which is based on the existence of a hostile environment, it is reasonable to expect that violations are continuing in nature. . . ." 824 F. Supp. at 877. The court also stated that to establish a continuing violation, "the critical question is whether 'any present violation exists' during the statutory period." *Id.* (quoting *United Airlines. Inc. v. Evans*, 431 U.S. 553, 558 (1977)).

The Special Master created a formalized test to determine whether there was a continuing violation. *See* Appellants' Addendum at 244. He then used this test to wipe out Ms. Hodge's claim, stating that the harassing conduct to which Ms. Hodge had been subjected had not occurred with enough frequency to establish a continuing violation. *Id.*

However, the formalized test employed by the Special Master has never been utilized before by this court to determine a continuing violation, and we decline to do so today. It is settled law in the Eighth Circuit that "[t]he rationale underlying the allowance of actions for continuing discrimination is to provide a remedy for past actions which operate to discriminate . . . at the present time." *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975) (citing *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157, 1160 (8th Cir. 1971). It also is well settled that an isolated event, even one with continuing impact, alone does not constitute a continuing violation. *Herrero*

v. St. Louis Univ. Hosp., 109 F.3d 481, 486 (8th Cir. 1997). However, when a plaintiff challenges an *ongoing pattern or practice of discrimination* rather than one isolated instance, the alleged violation may be deemed continuing. *See Chaffin*, 904 F.2d at 1271; *Gardner* 752 F.2d at 1279; *Satz*, 619 F.2d at 743-44. As the *Jenson II* court correctly noted, the critical question in the continuing violation analysis, according to the Supreme Court, is to establish that any violation exists during the statutory period. 824 F. Supp. at 877 (citing *Evans*, 431 U.S. at 558).

We find that all of the plaintiffs, including Ms. Hodge, have met their burden to establish a continuing violation. Ms. Hodge and the other plaintiffs are not challenging an isolated instance of sexual harassment, but instead the *ongoing pattern or practice* of the defendants' maintenance of a hostile work environment. Thus, the violation may be deemed continuing under the law of this circuit, if the plaintiff establishes that any violation took place during the statutory period. *See Chaffing* 904 F.2d at 1271; *Gardner,* 752 F.2d at 1279; *Satz,* 619 F.2d at 743.

The Special Master conceded that Ms. Hodge was subjected to sexual harassment on at least one occasion during the statutory period. *See* Appellants' Addendum at 243. In addition to this incident, Ms. Hodge testified that since 1990 she has repeatedly been subjected to graphically sexual language in the workplace. Trial Tr. Vol. XIII at 255-56.

Because Eveleth Mines was engaged in a pattern and practice of discrimination by maintaining a hostile work environment, and because Ms. Hodge established that she was subjected to at least one incident of harassing behavior during

the statutory period, we find that her claim is part of a continuing violation and is not time barred. The Special Master's finding to the contrary is in error.

VI. Survival of Claim — Patricia Kosmach

Prior to the damages phase of the trial, plaintiffs moved to substitute Susan Bonach as a party to the action in place of her deceased mother, class member Patricia Kosmach. The Special Master denied the motion on the grounds that Kosmach's claim abated pursuant to Minn. Stat. § 573.01. Appellants' Addendum at 1. The district court affirmed the Special Master's ruling.

Plaintiffs assert that the MHRA, not the survival statute codified at § 573.01, determines whether an MHRA claim survives the death of the plaintiff. Plaintiffs argue that the plain language meaning of the MHRA allows the substitution of a legal representative in a cause of action brought under the MHRA. Thus, plaintiffs argue, Kosmach's claim survives her death, irrespective of the survival statute.

The MHRA states: "Any person aggrieved by a violation of this chapter may bring a civil action. . . ." Minn. Stat. § 363.06, subd. 1. "Person" is defined as: "partnership, association, corporation, *legal representative,* trustee, trustee in bankruptcy, receiver, and the state and its departments, agencies, and political subdivisions." Minn. Stat. § 363.01, subd. 28 (emphasis added). We cannot conclude these provisions reflect a legislative intent to create a right of survival for MHRA civil rights claims. By the inclusion of "legal representative" in the definition of "person," the legislature may have intended to allow a claim to be brought on behalf of a party who is unable to bring the claim.

Appendix A

Whether Kosmach's claim survives her death must be evaluated under Minnesota survival statute codified at § 573.01. That section provides:

> A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists. . . . All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter.[21]

Minn. Stat. § 573.01, (1996).

The Minnesota Court of Appeals has determined the MHRA claims constitute "injury to the person" and thus abate upon the death of the claimant. *Lipka v. Minnesota Sch. Employees Ass'n*, 537 N.W.2d 624, 630 (Minn. Ct. App. 1995). We therefore conclude under Minnesota law Kosmach's claim in this action abated upon her death.

VII. Conclusion

It should be obvious that the callous pattern and practice of sexual harassment engaged in by Eveleth Mines inevitably destroyed the self-esteem of the working women exposed to it. The emotional harm, brought about by this record of human indecency, sought to destroy the human psyche as well as the human spirit of each plaintiff. The humiliation and degradation suffered by these women is irreparable. Although money damage cannot make these women whole or even begin to repair the

21. Section 573.02 contains an exception to abatement for claims for special damages. Kosmach did not seek specific damages in this action, and therefore does not qualify for the exception.

injury done, it can serve to set a precedent that in the environment of the working place such hostility will not be tolerated.

In view of our rulings, we remand this case to the district court for a trial *de nova* the issue of damages. The parties may stipulate as to the use of any testimony previously given. The district court may supplement any testimony given. At this stage, we feel the district court should decide the damage issues and not make further reference to any Special Master. We recognize this places a tremendous burden on the court, but in view of the record, we hesitate to introduce any new fact finder into the case.

In our supervisory role, we make the following observation. Our purpose in making this observation is to express our concern about the inordinate delay encountered by the parties to this case. This case has been pending for almost ten years. The final chapter is yet to be written. No one can expect that justice will be rendered to any of the parties when a final opinion is issued more than ten years after this litigation commenced. Even worse, the judiciary must now try to provide reparation for harm dating back to 1983.

The executive and legislative branches of our government bear some responsibility for this delay. During much of the intervening time, the District of Minnesota was shorthanded because of the delayed appointments of two district judges. The problem is a continuing one, from the far past to the present. Much of the responsibility for judicial vacancies is attributable to the political process and the refusal to expedite judicial appointments. This delay only serves to aggravate the litigation crunch Article III judges confront on a daily basis. The ultimate victims of this delayed process are the American people.

Responsibility also lies with the bar whose members are officers of the court. The lawyers in this case delayed its resolution by exercising senseless and irrelevant discovery, and by making endless objections at trial. But "the buck stops here;" the judicial system allowed the lawyers to do what they did. If our goal is to persuade the American people to utilize our courts as little as possible, we have furthered that objective in this case. If justice be our quest, citizens must receive better treatment. The judiciary must somehow afford more efficacious monitoring of delayed cases. We must achieve this goal through action, not just by words.

Upon remand, we require the district court to expedite a new trial. We also implore the parties to sincerely make every effort to resolve their differences.

JUDGMENT OF DISMISSAL OF PATRICIA S. KOSMACH'S CLAIM IS AFFIRMED.

THE JUDGMENT AWARDING DAMAGES FOR THE PLAINTIFFS IS HEREBY VACATED AND THE CAUSE IS REMANDED FOR A NEW TRIAL ON PLAINTIFFS' COMPENSATORY AND PUNITIVE DAMAGES CLAIMS.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FIFTH DIVISION DATED NOVEMBER 8, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civil No. 5-88-163

Lois E. Jenson, Patricia S. Kosmach, and Kathleen O'Brien Anderson, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

vs.

Eveleth Taconite Company, Eveleth Expansion Company, Oglebay Norton Company, and Oglebay Norton Taconite Company, doing business as Eveleth Mines, and the United Steel Workers of America, Local 6860,

Defendants.

MEMORANDUM OPINION AND ORDER

Jean M. Boler and Gregory L. Wolsky, Sprenger and Lang, Minneapolis, Minnesota, and Paul C. Sprenger and Jane Lang, Sprenger and Lang, Washington, District of Columbia, for Plaintiffs.

Thomas J. Shroyer, David P. Jendrzejek, and W. Scott Herzog, Moss & Barnett, Minneapolis, Minnesota, for Defendant Eveleth Mines.

Appendix B

Scott A. Higbee and John G. Engberg, Peterson, Engberg & Peterson, Minneapolis, Minnesota, for Defendant United Steel Workers of America.

Introduction

Before the Court are Plaintiffs' Objections to the Report and Recommendation of

Special Master Patrick J. McNulty filed March 28, 1996. The "Eveleth Mines"

Defendants have filed no objections, and request that the Court adopt the Report.

Defendant United Steelworkers of America, Local 6860, has filed an objection to a single statement concerning the Union's interaction with Plaintiff Lois Jenson. For the reasons set forth below, the Report will be adopted in its entirety.

Background

The history of this litigation need not be recounted in detail here.[1] Individual Plaintiffs Lois Jenson and Patricia Kosmach[2] initiated this lawsuit on August 15, 1988 against Defendants Eveleth Taconite Company, Eveleth Expansion Company, Oglebay Norton Company, and Oglebay Norton Taconite

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1. For a more thorough explanation of the events leading up to this decision, the reader is referred to *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993) (*Jenson I*).

2. Kosmach is no longer a Plaintiff in this lawsuit.

Company, who are collectively referred to as "Eveleth Mines." The employee union, United Steelworkers of America, Local 6860, was also named as a Defendant. Plaintiffs claimed discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363.03, subd. 1(2).

On December 9, 1991, this Court certified a class of Plaintiffs consisting of all women who had applied for, or had been employed in, hourly positions at Eveleth Mines who had been, were being, or would be discriminated against on the basis of their sex, dating back to December 30, 1983.[3]

The litigation was subsequently bifurcated into two phases: 1) the "liability" phase to determine whether Eveleth Mines violated Title VII and/or the MHRA; and 2) the "recovery" or "damages" phase to determine the eligibility of individual class members for compensatory relief. See *Jenson I,* 824 F. Supp. at 856.

On May 14, 1993, the Court issued its opinion concerning the "liability" phase of the trial. The Court found that Plaintiffs had established that "Eveleth Mines engaged in a pattern or practice of maintaining an environment sexually hostile to women." *Id.* at 888. In particular, the Court found that Eveleth Mines followed a pattern and practice of discrimination on the basis of sex relating to two categories of claims: 1) promotions to the position of "step-up foreman",[4] and 2) sexual harassment.

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3. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991).

4. Step-up foremen are hourly employees who are given supervisory responsibility over crews of workers for temporary periods. *See id.* at 867. In the mines, they must come from the particular work crew whose foreman is absent. *See id.*

Id.[5] Because of these findings, Plaintiffs became eligible for certain prospective relief, including an injunction as well as certain attorneys' fees and costs. *See id.* at 888-89.[6]

Subsequently, the second phase of the bifurcated trial for the sexual harassment and step-up foremen claims was referred to a Special Master[7] in accordance with 42 U.S.C. § 2000e-5(f)(5) and Federal Rule of Civil Procedure 53. The Special Master was directed to consider the compensatory and punitive damages claims raised by sixteen female employees of Eveleth Mines. After a trial which spanned approximately seven weeks of court time, the Special Master issued a 416-page Report. He recommended that the Court enter judgment against

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5. A bench trial was conducted, as neither Title VII nor the MHRA provided for a trial by jury under these circumstances. The MHRA states that claims brought under that Act shall be tried by a judge sitting without a jury. Minn. Stat. § 363.14, subd. 2. There was also no right to a jury trial under Title VII until the passage of the Civil Rights Act of 1991. The 1991 Act amended Title VII to provide for jury trials when compensatory or punitive damages were sought. However, the Supreme Court determined that the 1991 Act's provision of a jury trial right does not retroactively extend to conduct which occurred before the Act's effective date, November 21, 1991. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1506-08 (1994). Given that the conduct complained of in this case occurred before that date, no right to a jury trial attached to Plaintiffs' claims, either at the "liability" or the "damages" stage.

6. The court found that Plaintiffs had failed to establish class-wide liability on their claims of discrimination with respect to hiring, job upgrades and temporary assignments, compensation, training, hiring into craft positions, discipline, and retaliation. *See id.* at 888.

7. United States Magistrate Judge Patrick J. McNulty.

Eveleth Mines and in favor of Plaintiffs in the aggregate amount of $182,500 as compensatory damages for mental anguish on Plaintiffs' sexual harassment claims, that a fine of $32,000 be imposed against Eveleth Mines, payable to the State of Minnesota, and that judgment be entered in favor of Eveleth Mines on all other claims.[8] He recommended that a statutory penalty be levied against Eveleth Mines in the amount of $32,000, payable to the State of Minnesota, pursuant to Minn. Stat. 363.071, subd. 2.

Plaintiffs filed Objections to the Special Master's Report within the allotted time; Eveleth Mines filed none.[9] Defendant United Steel Workers of America, Local 6860, filed one objection to the Special Master's Report.[10] Plaintiffs allege

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8. The Special Master concluded that Plaintiff Hodge's claim was time-barred. In the alternative, he recommended that judgment be entered against Eveleth Mines and for Diana Hodge in the amount of $7,000 as compensatory damages for sexual harassment. Report at 416. *Id.* at 194.

9. Given the enormity of the task confronting the parties and this Court, Plaintiffs were allowed to file a 125-page brief outlining their objections to the Report; Eveleth Mines subsequently filed a 75-page response; and Plaintiffs filed an additional reply to Eveleth Mines' response. Oral argument on Plaintiffs' Objections occurred on July 3, 1996.

10. The Union's sole objection to the Special Master's report concerns the description of the circumstances surrounding the elimination of Jenson's warehouse job in November, 1991. In a second lawsuit filed by Jenson against Eveleth Mines and the Union (Court File No. 5-93-26), she claims that the Union retaliated against her, in violation of the MHRA, in that it failed to grieve the

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numerous errors of fact and law committed by the Special Master, which may, for ease of organization, be classified as follows:

1) The Special Master erroneously required Plaintiffs to prove that the hostile environment was the direct and sole cause of their psychiatric symptoms;

2) The Special Master erroneously required Plaintiffs to bear a burden of proof on their damages for mental anguish, instead of shifting the burden to Eveleth Mines to disprove such damages.

3) The Special Master erred in not awarding full compensatory damages for the aggravation of Plaintiffs' pre-existing conditions;

4) The Special Master mistakenly excluded the testimony of Plaintiff's psychiatric and psychological experts regarding the case of Plaintiffs' Mental disorders as well as their testimony explaining their opinions diagnoses, and prognoses;

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elimination of the warehouse position. The Special Master stated that "Jenson filed a grievance" and "[t]he Union refused to process" it with respect to the elimination of her warehouse job. Report at 267 n.256. However, in Jenson's second suit, this Court held that Jenson "did not *formally* request [the Union] to act on her behalf" with respect to the elimination of the position. *See* Mem. Op. & Order at 11 n.l l (Nov 30, 1993) (emphasis in original). Neither Plaintiffs nor Eveleth Mines offers any response to the apparent inconsistency. The conflict can be solved by striking footnote 256 from the Special Master's Report which, in the context of the case, represents an insignificant detail. The striking of this footnote in no way affects the posture of Jenson's claim of reprisal against the Union in her second lawsuit, Court File No. 5-93-26. Footnote 256 will be stricken.

5) The Special Master erroneously failed to award punitive damages;

6) The Special Master mistakenly failed to award other compensatory damages, in addition to mental anguish damages, and failed to take into account Plaintiffs' long exposure to the hostile environment, the pressures and stresses of the present litigation, and future damaging effects caused by Eveleth Mines' hostile environment; and

7) The Special Master erred in failing to shift the burden of proof to Eveleth Mines in considering the claims of constructive discharge and failure to promote to step-up foreman.

Defendants respond to these objections by asserting that the Special Master resolved all of the above issues correctly, such that his Report should not be disturbed but instead adopted in full.

Discussion

I. Standard of Review

The parties dispute the scrutiny with which this Court must regard the Special Master's Report. Plaintiffs argue for a *de novo* review of the entire Report, as the Special Master's errors are alleged to have polluted all of the findings and conclusions therein. Eveleth Mines champions a "clearly erroneous" standard for all of the Special Master's determinations.

The correct path cuts between the parties' views. Generally, "[i]n a bench trial, ascertaining the plaintiff's damages is a form of factfinding that can be set aside only if clearly erroneous."

Hall v. Gus Const. Co., 842 F.2d 1010, 1017 (8th Cir. 1988) (citing *Webb v. Arresting Officers*, 749 F.2d 500, 501-02 (8th Cir. 1984)); see also Fed. R. Civ. P. 53(e)(2) ("In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."). However, the Special Master must necessarily make conclusions of law in calculating damages, and these conclusions are subject to *de novo* review. E.g., *Stauble v. Warrob, Inc.*, 977 F.2d 690, 697 (1st Cir. 1992) (citing *Polin v. Dun & Bradstreet. Inc.*, 634 F.2d 1319, 1321 (10th Cir. 1980)). Thus, the Court will perform a *de novo* review of the legal standards applied by the Special Master, but will not disturb his factual findings unless they are determined to be clearly erroneous."[11].

II. Level of Causation Required

Plaintiffs contend that the Special Master required them to prove that the hostile environment was the direct and sole cause of their mental disorders and symptoms. Claimants' Mem. in Supp. of Objs. to Special Master McNulty's Report and Recommendation 3. This contention is easily addressed and rejected, since the Report nowhere adopts such a standard. To the contrary, the Special Master applied the proper test. Damages for mental suffering may be recovered only if they were "directly caused by the defendant's wrongful act," *Edwards v. Jewish Hospital of St. Louis*, 855 F.2d 1345, 1353 (8th Cir. 1988), and "direct cause" means that the act must have been a substantial factor in bringing about the harm. Report at 17 (citing *Restatement of Torts* (Second) § 431).[12]

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11. In reviewing the Special Master's decisions on the exclusion or the admittance of evidence, the Court will employ the "clear abuse of discretion" standard. *See infra* Section V.

12. While Section 431 of the Restatement specifically applies to negligent conduct, comment (e) states that the rule is equally applicable where the conduct is intended to cause harm.

Plaintiffs agree with this standard: "Causation is therefore established if the hostile environment was a substantial factor in the emotional harm suffered; it does not have to be the sole factor or even the *most* substantial factor." Claimant's Mem. at 4 (emphasis in original). While Plaintiffs believe that the Special Master erroneously placed the burden of proving causation of damages on them, and believe that the exclusion of their experts' evidence on causation was mistaken, the basic causation standard used was proper.[13]

III. Burden of Proof on Damages for Mental Anguish

Plaintiffs argue that, given the finding of a hostile environment in *Jenson* I, Eveleth Mines must bear the burden of proving that the damages sought were attributable to some source other than the discriminatory conduct. Plaintiffs initially charge that, on the basis of Jenson I, they enjoy a presumption that "the employer unlawfully discriminated against individual class members." *Craik v. Minnesota State University Bd.*, 731 F.2d 465, 470 (8th Cir. 1984). Plaintiffs then contend that the finding in *Jenson I* also relieves them of the burden of proving a causative link between Eveleth Mines' conduct and their mental problems and symptoms. This represents an unwarranted extension of burden-shifting principles announced in previous case law, and the Special Master correctly rejected this argument.

The Special Master noted that a finding of a hostile environment does not automatically entitle each claimant in a class action to monetary relief. Report at 7. This proposition is well-recognized under both Minnesota and federal law, as well

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13. *See Infra* Section III.

as in *Jenson I*.[14] The Minnesota Supreme Court has explicitly observed:

> The trial court's finding that defendant discriminated against its female employees on the basis of sex did not automatically entitle ail of defendant's female employees to recover damages. Each was required to show that, because of defendant's discriminatory practice, she suffered a loss. . . .
>
> The purpose of this required showing is not to impose a "duty" on victims to fight discrimination; rather it is intended to limit payment of damages to those actually damaged.

Dodge v. Minnesota Min. & Mfg. Co., 278 N.W.2d 97, 100 (Minn. 1979). *See also, e.g., Stallworth v. Shuler,* 777 F.2d 1431, 1435 (11th Cir. 1985) ("Under *Carey v. Piphus,* 435 U.S. 247, 263-64, 98 S. Ct. 1042, 1052-53, 55 L. Ed.2d 252 (1978),[15] compensable damage may not be presumed but must

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14. Minnesota law is especially relevant here, as the claims for compensatory damage are only cognizable under the MHRA, not Title VII, based on the timing of the illegal conduct. Federal precedent, however, may also be used to interpret the MHRA: "In addition to state cases applying the MHRA, courts may look to federal cases interpreting analogous federal anti-discrimination statutes for guidance." *Allen v. Bridgestone/Firestone. Inc.*, 81 F.3d 793, 796 (8th Cir. 1996) (citing *Continental Can Co. v. Minnesota*, 297 N.W.2d 241, 246 (Minn. 1980)).

15. Carey involved claims for mental and emotional distress caused by the denial of procedural due process under 42 U.S.C.

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be proven."); *Vance v. Southern Bell Tel. & Tel.* Co., 672 F. Supp. 1408, 1416 (M.D. Fla. 1987), *aff'd*, 863 F.2d 1503 (11th Cir. 1989) ("Plaintiff had the burden of proving that the alleged discrimination by the Defendant caused the stress that resulted in her alleged emotional harm or humiliation.").

Jenson I itself distinguishes a sexual harassment class action from other "pattern and practice" claims:

> Should the employer be found to have engaged in a pattern or practice of discriminating against women by maintaining a hostile environment, the plaintiff class will be eligible for appropriate prospective relief and other remedies consistent with a finding of liability in other pattern or practice cases. However, the nature of a hostile environment claim mandates that the nature of the recovery phase differ from traditional pattern and practice cases. Specifically, a determination that the employer engaged in a pattern or practice of discrimination by maintaining a hostile environment does not entitle every member of the plaintiff class to a presumption that they were sexually harassed — the burden does not shift to

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(Cont'd)

§ 1983. The Court held that "neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused." 435 U.S. at 264, 98 S. Ct. at 1052. While this case involves discrimination on the basis of gender rather than a denial of procedural due process, the Supreme Court stated that, while plaintiffs are not ordinarily required to prove with exactitude the amount of damages which would compensate their intangible injuries, plaintiffs still must prove that defendant's conduct *caused* the injury. 435 U.S. at 267 n.25, 98 S. Ct. at 1054 n.25.

> the employer. Cf. *Craik, 731* F.2d at 470 (discussing shifting burdens in typical class actions). Instead, the burden of persuasion remains on the individual class members; each must show by a preponderance of the evidence that she was as affected as the reasonable woman.

Id. at 875-76.

Assuming that each individual Plaintiff has proven that she was as affected as the reasonable woman,[16] each individual Plaintiff still maintains the basic burden of tort law of showing that the hostile environment directly caused her mental anguish. The Court in *Jenson* I observed that basic liability to individual class members was established if the individuals could show that they were at least as affected as the reasonable woman. *Id.* at 876. Yet nothing in *Jenson* I excuses each individual Plaintiff from demonstrating that, given that she was at least as affected as the reasonable woman, she is entitled to all damages alleged if the employer cannot disprove her assertion that the environment caused her damages. Indeed, the Court in *Jenson* I observed that asking an employer to prove a negative (i.e., that the individual Plaintiffs' damages were not caused by the hostile work environment) is "objectionable where it effectively shifts to a class action defendant the burden of proof on an issue which is carried by the plaintiff in an individual action." *Id.* at 876 n.73.

The burden placed on the employer is thus the burden of persuading the trier of fact (i.e., the Special Master) "that it is

16. All of the claimants, with the exception of Diana Hodge, whose claim was determined to be time-barred, received damages compensating them for the mental anguish suffered at Eveleth Mines. Report at 415-16.

more likely than not that the employer did not unlawfully discriminate against the individual." *Id.*[17] Obviously, Eveleth Mines was not able to meet this burden. All of the women were found to be victims of the hostile environment, and thus victims of discrimination. The presumption's vitality does not extend beyond this finding. The Supreme Court cases in which this burden-shifting analysis was articulated demonstrate that the burden upon the employer is only one of proving that the individual Plaintiffs were not in fact victims of discrimination. *See International Bhd. of Teamsters v. United States,* 431 U.S. 324, 361-62, 97 S. Ct. 1843, 1868 (1977); *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 772-73, 96 S. Ct. 1251, 1268 (1976).

Plaintiffs primarily rely on *Woolridge v. Marlene Industries,* 875 F.2d 540 (6th Cir. 1989), to support their contention that Eveleth Mines has the burden to prove that its acts did not cause Plaintiffs' injuries. *Woolridge* involved an employer which had instituted a mandatory maternity leave policy found to discriminate against women on the basis of their gender. The *Woolridge* court applied the burden-shifting principles announced by the Supreme Court in *Franks* and *Teamsters,* and held that the employer had the burden of proving that a claimant's absence from work was attributable to a reason other than the unlawful leave policy. *Id.* at 546. In other words, the employer had to prove that the leave policy did not affect each individual woman, and thus, that they were not discriminated

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17. While other circuits require that the employer present "clear and convincing evidence" that it did not discriminate against an individual claimant, the Eighth Circuit has adhered to a "preponderance of the evidence" standard. *See Craik,* 731 F.2d at 470 n.8 (citing *McKenzie v. Sawyer,* 684 F.2d 62, 77-78 (D.C. Cir. 1982).

against and had no claim to damages. If the employer could not prove that, given a pattern of discrimination had already been found, the individual woman had not faced discrimination, the woman had to produce "information sufficient to enable the court to determine the amount of back pay due her." *Id.* at 547.

In *Woolridge,* the claimants did not seek damages for mental anguish, but only the more easily quantifiable restoration of back pay. The employer's discriminatory policy, if the employer failed to prove that it did not affect each individual, obviously caused a certain amount of damage to the plaintiffs by not allowing them to work. It is not the same here, where the hostile environment did not inevitably cause Plaintiffs' mental distress. In *Woolridge,* the employer properly had to show that an individual employee was not affected by the discriminatory policy; here, Eveleth Mines had to demonstrate that the individual employees were not affected by the hostile environment, and failed. Indeed, as was observed in *Jenson* I, the allocation of burdens in the recovery phase here is different from "a pattern and practice case alleging sex discrimination in hiring or promotion," which logically extends to cover the policy in *Woolridge* (i.e., a policy of forced leave). 824 F. Supp. at 876 n.72. In such a case,

> [t]he actions of class members are relevant only to the extent that each must show that she applied for the job or sought the promotion. The reactions of class members, however, that is, whether a female employee was angry, sad, ambivalent or delirious at not being hired or promoted, is irrelevant to determining whether the employer discriminated against her.

Id. Woolridge does not demand that Plaintiffs here be relieved of the duty of showing that their alleged damages flowed from Eveleth Mines' conduct.

Therefore, this Court finds no error of law in the allocation of the burdens of proof by the Special Master in this regard.

IV. Aggravation of Plaintiffs' Pre-Existing Conditions

Plaintiffs argue that the Special Master misapplied the law governing the effect of a pre-existing condition on recovery for emotional distress in two related ways. First, they contend, Eveleth Mines must be held responsible for all of Plaintiffs' emotional distress if the cause for that distress cannot be apportioned among several causes. Second, they assert that the Special Master erred in not awarding full damages to "sensitive plaintiffs."[18] The two alleged errors are related and will be discussed together.

Plaintiffs argue that "[i]f the factfinder cannot determine what portion of the aggravated condition is attributable to the wrongful conduct or if it cannot [ ] say whether the condition would have existed apart from the defendant's conduct, then the entire condition should be compensated." Claimant's Mem. at 9. The question revolves around the effect of an inability to apportion emotional distress to several different causes.[19]

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18. The Special Master found that Plaintiffs had failed to establish, by a preponderance of the evidence, that they were especially susceptible to sexual harassment. Report at 35.

19. The Special Master observed: "There is uniformity of opinion among the psychiatrists who testified on the subject that allocating cause, or proportionate cause, among several stressors is beyond scientific knowledge." Report at 105.

Appendix B

Plaintiffs contend that the inability of psychological science to mete out their emotional distress to separate causes (i.e., between traumatic events in their personal lives and the hostile environment at Eveleth Mines) means that recovery for *all* emotional distress suffered by Plaintiffs from Eveleth Mines is warranted. Plaintiffs quote the Restatement (Second) of Torts § 433A, comment (i):

> Where two or more causes combine to produce a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.

However, this comment is countered by language of Section 433B:

> (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff *is upon the plaintiff.*
>
> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
>
> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused

> to the plaintiff by only one of them, but there is uncertainty as to which one caused it, the burden is upon each such actor to prove that he has not caused the harm.

Restatement of Torts (Second) § 433B (emphasis added). The second subsection does not apply, as Eveleth Mines has not argued that the harm is capable of apportionment, and there are no competing claims of tortious actors as contemplated by the third subsection.[20] Thus, the general rule that Plaintiffs must prove causation is applicable — as previously noted; Plaintiffs bear the burden of showing that the hostile environment caused their mental distress.[21]

"Minnesota law allows a person with a pre-existing injury to recover damages for aggravation of that condition, but recovery is limited to the additional injury over and above the pre-existing condition." *Marshall v. Galvez,* 480 N.W.2d 358, 361 (Minn. Ct. App. 1992) (citing *Schore v. Mueller,* 186 N.W.2d 699, 701 (Minn. 1971)). In addition, under Minnesota law, the party who raises the question of the aggravation of a pre-existing condition must prove that the damages caused by the competing causes are amenable to apportionment. *Marshall,* 480 N.W.2d at 362. The Special Master found that Plaintiffs had raised the question and had not borne the burden of proving that the pre-existing condition and the total damage could be

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20. The rule in the third subsection "applies only where it is proved that each of two or more actors has acted tortiously, and that the harm has resulted from the conduct of some one of them." *Id.*, cmt. (g). Such is not the case here.

21. See *supra* Section III.

sorted out. Report at 37-38.[22] This determination answers a question of fact, and, as such, may only be reversed if it is clearly erroneous. The Court finds that the Special Master did not commit clear error in this regard.

Moreover, to follow Plaintiffs' logic would lead to the imposition of liability for damages upon Eveleth Mines for emotional distress which it is not shown to have caused. Even if, in general, the Special Master found that Plaintiffs' experts were not capable of dividing the effects of the hostile environment, damages could only be imposed for distress caused by Eveleth Mines, and the Special Master had a duty to consider factors "directly relevant to whether and to what extent [the employer] caused [the employee's] emotional distress." *Cowan v. Prudential Ins. Co. of Am.*, 852 F.2d 688, 691 (2d Cir. 1988). In affirming the trial court's award of damages in *Cowan,* the Second Circuit approved of the district judge's efforts to "distinguish[] the injuries he believed to be caused by the discrimination from those caused by other factors." *Id.* The Court further held that, "[g]iven the unquantifiable nature of the injuries, and the substantial deference we afford to the court in awarding damages, we will not substitute our views for those of the trial court." *Id.* Plaintiffs cannot be relieved of their burden

22. Plaintiffs argue that this application of Minnesota law operates to make them prove that the hostile environment was the sole cause of their emotional distress. To the contrary, the Special Master merely required that the damages suffered be linked to Eveleth Mines' conduct. All of the Plaintiffs, save one, received damage awards — even though Plaintiffs' experts could not apportion the cause of Plaintiffs' emotional distress between their experience at the mines and their previous life histories. Obviously, the crux of Plaintiffs' objections is found in the amount of damages awarded, not in the phantom requirment that the hostile environment be the sole cause of their emotional distress.

of proving causation by the lack of apportionment between causes.

In a related vein, Plaintiffs contend that they are entitled to the benefits of the "eggshell skull" doctrine, in arguing that Eveleth Mines must take Plaintiffs "as they find them," and may not avoid compensating damages which result from Plaintiffs' especially vulnerable state. Plaintiffs contend that the Special Master erroneously lowered his calculation of damages because he believed Plaintiffs were unusually susceptible to sexual harassment. Claimant's Mem. at 9-10.

The Special Master, however, found that "there is no evidence to support the claim of aggravation of a pre-existing mental condition or the claim that any claimant was more susceptible than normal to sexual harassment and that damages were magnified." Report at 35. Even if such evidence did exist in the record, the Special Master continued, the Restatement limits the "eggshell skull" doctrine to pre-existing physical conditions. *Id.* at 36 (citing *Restatement of Torts* (Second) § 461, cmt. (a)). While recognizing that the doctrine has been extended to latent emotional instability or psychiatric illness, the Special Master adhered to the language of the Restatement and held that the doctrine would not apply here. *See id.* (citing *Munn v. Algee,* 924 F.2d 568, 576 (5th Cir.), *cert. denied,* 502 U.S. 900, 112 S. Ct. 277 (1991)).

The lack of susceptibility is a finding of fact which may be overturned only if clearly erroneous. Upon a careful review of the record, the Court determines that the Special Master's Report and Recommendation is not clearly erroneous. Even if such evidence were presented, the Special Master determined, Eveleth Mines' liability for reactions beyond that of a normal individual

would be limited by its knowledge of those conditions. "[I]n the absence of knowledge of the Plaintiff's unusual susceptibility, there should be no recovery for hypersensitive mental disturbance where a normal individual would not be affected under the circumstances." *Valdez v. Church's Fried Chicken. Inc.*, 683 F. Supp. 596, 615 (quoting Prosser, *Law of Torts* 352 (3d ed. 1964)); *see* Report at 35.

V. Exclusion of Testimony from Plaintiffs' Experts

A trial court's decision on admissibility of evidence is reviewed for "clear abuse of discretion." *Hose v. Chicago N.W. Transp. Co.*, 70 F.3d 968, 972 (8th Cir. 1996) (citing *Gier v. Educational Serv. Unit No. 16,* 66 F.3d 940, 942 (8th Cir. 1995)). Such a standard should be applied here.

The Special Master excluded the opinions of Plaintiffs' experts under Federal Rule of Evidence 702, as interpreted by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals. Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). Rule 702 states that, when considering the admissibility of expert testimony, a court must consider whether the specialized testimony will help the trier of fact "to understand the evidence or to determine the fact in issue." A determination of the testimony's "helpfulness" includes consideration of: 1) whether the expert has sufficient specialized knowledge; 2) whether the testimony relates to a sufficient degree to an issue in the case; and 3) whether the testimony is based on reliable scientific methods. *See Daubert,* 509 U.S. at 589-93, 113 S. Ct. at 2795-96;[23] *see also* 3 *Weinstein's Evidence* ¶¶702[02]; 702[03]; Report at 22-30.

23. Footnote 8 in *Daubert* raises a question as to whether its analysis applies only to "scientific," as opposed to "psychological," (Cont'd)

Appendix B

In evaluating the admissibility of testimony based on scientific validity, the Supreme Court has outlined a two-part assessment of the testimony. The Court should examine "whether the reasoning and methodology underlying the testimony is scientifically valid and [] whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592-93, 113 S. Ct. at 2796; *see also Gier,* 66 F.3d at 943; *McKnight v. Johnson Controls. Inc.,* 36 F.3d 1396, 1406 (8th Cir. 1994). The Eighth Circuit has noted that district courts should rely on four non-exclusive factors when assessing the reliability of a "novel" scientific method: 1) whether the scientific technique can be, and has been, tested; 2) whether the technique or theory has been subjected to peer review and publication; 3) the known or potential rate of error of the technique; and 4) whether the technique has been generally accepted. *United States v. Martinez,* 3 F.3d 1191, 1196-97 (8th Cir. 1993). *See also Peitzmeier v. Hennessy Industries. Inc.,* 97 F.3d 293, 297 (8th Cir. 1996). The *Martinez* court also made clear that a district court "must conclude that the testimony was derived from the application of a reliable methodology or principle in the particular case." *Martinez,* 3 F.3d at 1198.

Based upon *Daubert* and Rule 702, the Special Master found Plaintiffs' expert opinions on both causation and prognosis inadmissible, stating: "This Court is persuaded by unanimous testimony of psychiatrists and psychologists, called by both sides, that there is no scientific method for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists." Report at 33.

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testimony. *See* Richardson *et al, The Problems of Applying* Daubert *to Psychological Syndrome Evidence,* 79 Judicature 10 (1995). The Eighth Circuit, however, applied *Daubert* to psychological evidence in *Gier,* and none of the parties disputes its application here.

Having carefully reviewed the entire record, including the transcript of the proceedings, the Special Master's Report and the arguments of counsel, the Court is satisfied that the Special Master properly analyzed and applied the legal principles of *Daubert* to the factual setting of this case and his conclusion to exclude and/or limit the testimony of Plaintiffs' expert witness was in all respects valid. This Court does not intend to interfere with the factual findings below.

VI. Failure to Award Punitive Damages

Plaintiffs argue that the Special Master erred in not allowing them the maximum amount of punitive damages available under the MHRA.[24] They assert that this Court's findings in *Jenson* I entitle them to such damages.

The Court looks to *Jenson I* and whether that decision established a permissible basis upon which to claim punitive damages. In *Jenson I*, the Court stated that "[s]exual harassment at Eveleth Mines was so pervasive that an inference of [management's] knowledge arises." 824 F. Supp. at 887. "In addition, many of Eveleth Mines' first-line supervisors had actual knowledge of the harassing behaviors: some foremen participated in them and others worked closely with those who did. Further, management personnel testified that they saw photos and graffiti of a sexual nature." *Id.* The Court found that Eveleth Mines "made no effort to eradicate the hostile environment existing within its facilities." *Id.* at 888. Accordingly, the Court concluded that Eveleth Mines knew or should have known of the harassment but failed to take proper

24. Neither party disputes the Special Master's determination that the applicable statutory cap on punitive damages for each Plaintiff is $6,000. See Report at 403-05.

remedial action, and thus, the last element of a claim for class-wide liability was satisfied. *See id.* at 886, 888.

The Special Master, however, distinguished between "imputing knowledge of discriminatory acts to a corporation," which was done in *Jenson I*, and imputing the "willful indifference" standard or behavior necessary for punitive damages under then existing Minnesota law to that corporation. Report at 403. The Special Master held that Plaintiffs could only recover punitive damages against Eveleth Mines if they presented clear and convincing evidence that a managerial agent engaged in sexually discriminatory conduct while acting in a managerial capacity, or ratified or approved of discriminatory acts by other workmen in a managerial capacity. *Id.* at 404. The Special Master went on to find that foremen were not "clothed with discretionary powers" of managerial agents, and thus, vicarious liability did not attach for foremen's actions. *Id.* at 404. He concluded that the Court was being asked to assume that some unidentified persons in managerial capacity had knowledge of the hostile environment, and that the state of the evidence was insufficient to allow the award of punitive damages. *Id.* at 404-05.[25]

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25. As additional reasons for denying punitive damages, the Special Master noted that: 1) it took time for employers to recognize their duty to eliminate sexual harassment in the workplace, and that the duty was not firmly established until the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2394 (1986); 2) the mining industry on the Iron Range was dominated by males who were products of a culture which apparently supported the harassment, and 3) that adding punitive damages onto the damages previously imposed on Eveleth Mines would represent an "inordinate punishment" and would not deter future bad acts. *See* Report at 409-11.

Cognizant of the deference to which the Special Master's determination of punitive damages is entitled, the Court determines that the Special Master's ruling on this is not clearly erroneous and will be sustained. In affirming Special Master on this issue, it is recognized that in *Jenson I*, the Court made clear that no one in management, with a few individual exceptions, addressed the problem, even in the light of management's actual knowledge. 824 F. Supp. at 887. Further, the Court found that, "[d]espite the pervasive presence of sexually offensive materials and other acts of sexual harassment, Eveleth Mines made no effort to eradicate the hostile environment existing within its facilities." *Id.* at 888. Finally, the Court concluded that this toleration made sexual harassment the "standard operating procedure" at Eveleth Mines. *Id.* This issue is not free from doubt and it seems clear that the factfinder could well have reached a contrary result and awarded punitive damages. However, the Court cannot, and does not, conclude that the Special Master's resolution of this issue is clearly erroneous.

VII. Failure to Award Additional Compensatory Damages

Plaintiffs also contend that the Special Master's compensation for the mental anguish damages suffered by Plaintiffs was too low. They essentially argue that he did not give appropriate weight to: 1) all of the instances of sexual harassment; 2) the stress in participating in this litigation and the psychological damage caused by it; 3) the future effects of the hostile environment; and 4) the possibility of compensatory damages *in addition to* those for mental anguish.

These arguments hold little water in light of the large discretion afforded the trier of fact on the issue of valuation of damages. "[I]nadequacy or excessiveness of an award is basically

a matter for the trial court. We have intervened only in those rare situations where we are pressed to conclude that there is 'plain injustice' or a 'monstrous' or 'shocking' result." *Occhino v. United States,* 686 F.2d 1302, 1305 (8th Cir. 1982).

First, Plaintiffs seem to contend that if an event was not specifically mentioned in the Special Master's Report, he must not have considered it in reaching his damage award. It is evident that they do not believe the Special Master's statement that "all testimony and other evidence was considered together with reasonable and permissible inferences." Report at 2 n. 1. It is equally evident, however, that the Special Master did not recount each separate incident of alleged harassment, and only concentrated on those he found to have the most effect on Plaintiffs — if every incident were detailed in the Report, the Report would have had to stretch into thousands of pages. *See id.* The Special Master was simply not required to recount each individual incident advanced by Plaintiffs and to explain why the event would not be considered a major part of each Plaintiff's damage award.[26] To the extent Plaintiffs complain that the Special Master mistakenly did not accord sufficient weight to particular evidence, the Special Master's determinations must be reviewed under the clearly erroneous standard. After a careful review of the Report, the transcript, the exhibits produced at trial, and Plaintiffs' objections, the Court determines that the Special Master did not clearly err in only recording his examination of the most serious incidents of sexual harassment in his Report.

Second, courts have recognized that the stress of engaging in litigation to protect one's (and others') rights may be a

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26. Indeed, if this phase of the case had been tried to a jury, Plaintiffs would receive merely a list of dollar amounts representing their damages, and no explanation as to what led to those calculations.

compensable injury. *See, e.g.*, [cases cited in Claimant's Mem. at 18-20]. Yet the Special Master explicitly took into account such stress. *See* Report at 284. Larger damage awards were given to those Plaintiffs, especially Jenson and Anderson, who have been intensely involved in this litigation for years. The detailed factual findings of the Special Master should not be disturbed simply because Plaintiffs contend he did not sufficiently weigh a factor of which he was obviously aware. The Court does not find that the Special Master's failure to award more damages for litigation stresses "monstrous" or "shocking," and will not modify the damage awards on such grounds.

VIII. Individual Plaintiffs' Claims for Lost Wages

Plaintiffs contend that the Special Master applied improper standards of proof in claims for lost wages by individual Plaintiffs Alaspa, Anderson, Jarvela, Jenson, and Robich. They claim that the Special Master erred in not shifting the burden of *persuasion*, as well as production, to Eveleth Mines to show that: 1) these women left work for some other reason aside from the sexual harassment with regard to their constructive discharge claims; and 2) they were not promoted to the step-up foreman position for a legitimate reason with regard to their failure to promote claims. The Court has carefully reviewed the record in this case and is satisfied that the Special Master's determinations with respect to the individual claims for lost wages is supported by sound legal principles and a more than adequate evidentiary basis. His determination will not be disturbed.

IX. Plaintiff Diane Hodge

The Special Master determined that Plaintiff Hodge's claim was time-barred and rejected the argument that she had

established a continuous violation. The Court has reviewed the transcript, the Special Master's Report and concludes that he applied the applicable law and that his factual determinations are fully supported by the evidence. This Court agrees that "the 1992 incident was an isolated incident involving one employee and is unrelated temporally or factually to acts of discrimination evidencing a hostile work environment to which Hodge may have been subjected between 1977 and 1983." Recognizing that this Court "may disagree" with his determination, the Special Master proceeded to consider Hodge's claim and would have awarded her $7,000.00. This Court concurs with this alternative evaluation of the claim.

Conclusion

As noted at the outset of this Memorandum Opinion and Order, Special Master McNulty's exhaustive Report followed a trial that lasted seven weeks. A review of the trial transcript reveals that hardly an issue was presented without disagreement and that counsel for both sides engaged in exhaustive examination and cross-examination of the many witnesses. In addition, lengthy briefs and arguments were presented to the Special Master. In his Report, the Special Master has attempted to resolve the several legal issues before him and to determine the many factual matters presented. This Court has conducted a *de novo* review of the entire record and the issues and objections presented to it. It would be impossible to review a record of this size and not take issue with one or more factual determinations made by the Special Master. This Court, however, is satisfied that the final determinations made below are amply supported by the record and that the legal conclusions are likewise correct. In this Court's view, the Special Master performed his duties in an exemplary fashion.

Appendix B

ORDER FOR JUDGMENT

Accordingly, based on the foregoing, and all of the records, files, and proceedings herein, IT IS ORDERED that the Report of the Special Master (Doc. No. 713) is AFFIRMED;[27] and judgment shall be entered as follows:

A. Against defendants collectively doing business as Eveleth Mines for infliction of mental anguish upon claimants, and

1. For Angel Alaspa in the amount of $6,000.00;

2. For Kathleen Anderson in the amount of $20,000.00;

3. For Shirley Burton in the amount of $20,000.00;

4. For Audrey Daniels in the amount of $15,000.00;

5. For Marilyn Greiner in the amount of $25,000.00;

6. For Joan Hunholz in the amount of $5,000.00;

7. For Judy Jarvela in the amount of $20,000.00;

8. For Lois Jenson in the amount of $25,000.00;

9. For Mavie Maki in the amount of $5,000.00;

10. For Michelle Mesich in the amount of $18,000.00;

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27. Footnote 256 is stricken.

11. For Priscilla Robich in the amount of $2,500.00;

12. For Deborah Ann Sersha in the amount of $5,000.00;

13. For Marcia Steele in the amount of $6,000.00;

14. For Marjorie Tolbert in the amount of $7,000.00;

15. For Denise Vesel in the amount of $3,000.00.

B. For the above-named defendants on all other claims made by these claimants.

C. For the above-named defendants on all claims advanced by Diane Hodge, or alternatively, against these defendants and for Diane Hodge in the amount of $7,000.00.

D. For the United Steel Workers of America, Local 6860 and against all claimants on all claims seeking damages or other legal relief.

E. For the State of Minnesota in the amount of $32,000.00.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 8, 1996.

s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge

APPENDIX C — EXCERPTS FROM THE REPORT OF THE SPECIAL MASTER DATED MARCH 28, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civ. No. 5-88-163

Lois E. Jenson, Patricia S. Kosmach and Kathleen O'Brien Anderson on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

vs.

Eveleth Taconite Company, Eveleth Expansion Company, Oglebay Norton Company and Oglebay Norton Taconite Company, doing business as Eveleth Mines, and the United Steel Workers of America, Local 6860,

Defendants.

REPORT OF SPECIAL MASTER

At Duluth, in the District of Minnesota, this 28th day of March, 1996.

The damage phase of the bifurcated trial of this sex discrimination in employment action, predicated on provisions of both Title VII of the Civil Rights Act of 1964. *Title 42 U.S.C. § 2000e-5,* and the Minnesota Human Rights Act, *Minn. Stats., Ch. 363,* came before the undersigned United States Magistrate Judge sitting as Special Master pursuant to appointment made

in conformance with Title 42 U.S.C. § 20003-5(f) (5) and rule 53, *Federal Rules of Civil Procedure.* This Report contains the Special Master's findings of fact, based upon admissible evidence presented, and the Special Master's conclusions of law, and is deemed to conform to Rule 53(e) (1), *Federal Rules of Civil Procedure.*

I.
INTRODUCTION

The damage phase of the bifurcated trial was convened to consider and determine compensatory and punitive damage claims advanced by 16 female employees of Eveleth Mines. In effect, the Court is charged with trying 16 separate lawsuits. There are some common elements in the claims, however, and it seems wise, at the outset, to place matters in perspective; to dispose of some common questions of law; and then to iterate findings of fact[1] pertaining to each individual claim and to incorporate any additional conclusions of law of special or general application.[2]

In this non-jury trial, this Court admitted testimony and other evidence of questionable admissibility and dubious probative value in an attempt to facilitate full and uninterrupted

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1. No attempt is made to review all testimony or other evidence contained in the voluminous Record, but all testimony and other evidence was considered together with reasonable and permissible inferences.

2. Where a conclusion of law is stated in the discussion of a particular claim, it should be understood that the conclusion of law has been applied to other claims to which it has applicability, even if it is not specifically restated in the discussion of that claim.

disclosure of all matters which counsel deemed of import with a declared intention to examine and determine admissibility and probative value of questionable testimony or other evidence in complete context. This has been done by examination of all documentary evidence and a complete review of the transcript of proceedings. The findings of fact reached are predicated upon evidence which bear indicia of relevance and reliability sufficient to be admissible, and weight has been afforded the evidence by balancing inconsistent or contradictory evidence and applying traditional credibility tests and standards.

In reviewing conclusions of law entered by a Special Master appointed under provisions of Title 42 U.S.C. § 2000e-5(f)(5), the Court is free to exercise almost unfettered independent judgment, whereas a review of findings of fact is made under the clearly erroneous standard. *Hawkins v. Ohio Bell Tel. Co.*, 93 F.R.D. 547 (Ohio 1982), aff'd., 785 F.2d 308 (6th Cir. 1986); *Brown v. Wesley's Quaker Maid, Inc.*, 771 F.2d 952 (6th Cir. 1985), cert. den., 479 U.S. 830 (1986). The format adopted herein may aid the Court in its review, and may enable the Court to remand for amended conclusions of law or findings of fact with ease, if need be.

* * *

IV.
MENTAL ANGUISH

Mental anguish is a legal, not a medical, term, and its meaning is more or less implicit. It connotes an emotional reaction occurring in reasonable temporal proximity to a precipitating event or events. Under Minnesota law, mental anguish, when not connected to a physical injury, includes

mental suffering caused by excitation of painful and poignant emotions; e.g., indignation, wounded pride, shame, public humiliation, despair and, probably, anger. Mental anguish can interfere with work performance or cause physical, social, emotional or other stresses, alone or in combination. It is an unquantifiable concept,[14] but some insight into the extent, severity or degree of mental anguish is provided by the victim's immediate physical and verbal reaction to the event, by later demonstrable repercussions by her testimony concerning her subjective reaction, and by effectiveness of her coping mechanism.[15] The analysis, however, cannot consist of carving the work environment into a series of discrete incidents, and measuring the harm caused by each incident. The perspective must be holistic, in which successive incident has predecessors,

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14. Plaintiffs divide mental anguish claims into separate impairments, and seek a separate monetary award for each type of impairment. This process further adds confusion to an already ethereal concept. This Court finds no authority for this approach, and it is rejected. On loss of enjoyment of life as a separate element of damages, see, *Anunti v. Payette*, 268 N.W.2d 52, 55 (Minn. 1978).

15. Coping methods frequently encountered include:

a denial of the impact of the event by mental blocking,

avoidance of the harasser,

entreaties to the perpetrator to cease,

engaging in joking or banter to make light of the situation, and

a formal or informal complaint to supervisors.

and the cumulative effect may be greater than the sum of its parts. In assessing distress inflicted upon a particular claimant, the synergistic effect of all acts, events, occurrences or conduct constituting sexual harassment to which she was subjected or which she witnessed will be considered, but will be tempered by any idiosyncratic or hypersensitive reaction.

Each claimant, of course, bears the burden of proving damages in a manner which permits conversion to a dollar amount, although precise proof is not necessary to support a reasonable award for infliction of mental distress, see, *Black v. H.R. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983), and, of course, damages will be awarded only for mental anguish caused by defendants' acts or conduct. Plaintiffs bear the burden of proving a causal connection between sexual discrimination and emotional distress. Cf., *Burns v. Electronic Industries, Inc.*, 989 F.2d 959, 965 (8th Cir. 1993). Emotional harm inflicted by events or experiences in a claimant's personal life is not compensable damage in this action. Cf., *Bartlett v. United States*, 835 F. Supp. 1246, 1265 (Wash. 1993); cf., *Vance v. Southwestern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1516 (11th Cir. 1989); *Corvan v. Prudential Ins. Co.*, 852 F.2d 688, 691 (2nd Cir. 1988); *EEOC Policy Guidance on Compensatory Damages under Civil Rights Act of 1991*, at 12. Plaintiffs would be entitled to recover for future, as well as past, mental anguish caused by defendants, but have failed to produce evidence from which the existence, extent or duration of any future mental anguish can be determined or evaluated, and have not effectively equated the harm suffered by a particular claimant caused by mental anguish inflicted by defendants to a monetary damage award. Instead, they have sought to advance some sort of comparative evaluation with verdicts returned in other cases involving unknown facts. This would be an improper use of a

flawed analogy. A damage award must reflect damages proven by each claimant, and, to do so, this Court has evaluated the evidence to measure the intensity, degree and effect of mental anguish inflicted, and has attempted to place a reasonable dollar value on a concept which is not quantifiable or subject to accurate monetary evaluation, without precisely allocating a dollar amount to future mental anguish where it is a consideration.

V.
CAUSATION

A sexual harassment case based upon a hostile work environment, not *quid pro quo*, is founded on principles of negligence and conventional rules of civil litigation, including the doctrine of proximate cause, apply. Cf., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1990); *Danz v. Jones*, supra at 399; *Department of Human Rights v. Spiten*, 424 N.W.2d 815, 818 (Minn. App. 1988). Once an unlawful employment practice has been proven, the victim must prove causation to sustain a claim for damages, cf., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988), and damages, even if intangible, must be limited to actual harm caused. Each claimant must prove by a preponderance of the evidence that unlawful discrimination to which she was subjected was a direct cause of damages she seeks to recover. Cf., *Edwards v. Jewish Hospital of St. Louis*, 855 F.2d 1345, 1352-53 (8th Cir. 1988); *Graham v. Baugham*, 772 F.2d 441, 446-47 (8th Cir. 1985); *Dodge v. Minn. Mining & Mfg. Co.*, supra at 100; also cf., *EEOC Policy Guidance on Compensatory Damages*, pp. 8-12 (1991); *Prosser and Keeton on Torts*, p. 165 (5th Ed. 1984). A direct cause is a cause which had a substantial part in bringing about harm which was either a direct result or a reasonably probable consequence of the act. Generally see, *Devitt and Blackmar, Federal Jury Practice and*

Instructions, §80.18, and cases cited; *Minnesota Jury Instruction Guides* (3d Ed.), JIG 140, and cases cited. In determining whether or not an act or omission played a substantial part in bringing about the harm, both federal and state law seem to adopt the Restatement "substantial factor" test. Under this test, an act which is a substantial factor in bringing about the harm is a direct cause of the harm. See, *Restatement of Torts (Second)*, §431 (1965). This test imposes a higher threshold than the discredited "but for" test as:

> The word "substantial" is used to denote the fact that defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than the so-called "philosophic sense", which includes every one of the great number of events without which any happening would not have occurred.

Id., comment (a).

A plaintiff's burden is more than to merely show that it is possible, or even "likely", that acts or omissions of a defendant caused the harm of which she complains. The preponderance of evidence standard requires a plaintiff to prove that it is "more likely than not" that the acts or omissions of a defendant played a substantial part in bringing about the harm. The focus is upon probability, not possibility. This does not mean that causation must be proven to a certainty. An inability to establish the precise mechanism whereby a particular factor caused a particular effect does not necessarily render proof of causation impossible. Causation can be established by compelling proof that the factor

in question must have somehow produced the damaging effect. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1320 (9th Cir. 1994) (on remand). However, compelling proof can seldom be wholly inferential. Inferences and presumptions are a staple of our adversary system, see, *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979), but, if a permissive inference is ever sufficient to carry a party's burden of proof, it achieves that compelling degree of persuasiveness only if ineluctably justified by sound reason and common sense exercised in the light of all proven facts. "Substantial part" means more than a minor or supporting role, but how much more? One Court seems to draw the line at 50%. See, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1994). There is merit in the simplicity of this numerical approach, but it is fraught with the danger of an unjust result. It seems best to leave the term undefined, and to determine whether or not something played a substantial part in bringing about harm on the basis of the provable magnitude of its impact upon the total harm suffered. It promotes justice to apply a nebulous concept by reasoned judgment on particular facts, rather than a mathematic computation.

VI.
EXPERT TESTIMONY

All claimants seek recovery of money damages for psychological or mental problems allegedly caused by a hostile working environment, and early in the pretrial stage, it became apparent that the extent of damage and causation of the damage would be hotly contested. It was anticipated that claimants would attempt to elicit proof on these matters through testimony of treating or specially employed psychiatrists and psychologists, and that defendants would counter with testimony of

psychiatrists retained for that purpose. It also became apparent that an unusually large number of witnesses would be called to render opinions as experts. In an attempt to conserve in-Court time, by expeditiously presenting factual evidence, to aid in a preliminary Rule 104 evaluation, to enable this Court to engage in effective pretrial preparation, and upon an assumption that expert reports which complied with provisions of Rule 26(a)(2)(B), *Federal Rules of Civil Procedure*, had been, or would be, disclosed; this Court, upon motion, entered an Order which provided that expert witness' reports would be offered and admitted into evidence as the direct testimony of the expert, and that oral testimony on direct examination would be limited to necessary clarification. However, everyone understood that expert opinions were not admitted into evidence, *carte blanche*, and that the Court and counsel were not relieved of duties and obligations imposed by Rules 104, 702 and 703, *Federal Rules of Evidence*, or the teaching of *Daubert*, infra.

The initial assumption led this Court to further assume that a report which properly disclosed the opinions to be expressed, the basis and reasons for the opinions, and the data or other information considered by the witness would suffice as threshold qualification for the witness to testify to the opinions. This Court was aware of the obligation to determine preliminary questions concerning admissibility of evidence, *Rule 104, Federal Rules of Evidence,* and of the teaching of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, __ U.S. __, 113 S.Ct. 2786 (1993), assumed that counsel was similarly informed, and sought to avoid, in this bench trial, time-consuming Rule 104 formal hearings. Unfortunately, the expectation was overly optimistic, and it was necessary to conduct the equivalent of a Rule 104 hearing as each prospective expert witness was called to testify. In *Daubert,* the Court solidified ground rules for trial courts.

Appendix C

The Court acknowledged that Rule 702, *Federal Rules of Evidence*, permits a witness, qualified as an expert by knowledge, skill, experience, training or education, to testify to scientific, technical or other specialized knowledge, by opinion or otherwise, if the scientific, technical or other specialized knowledge will assist the trier-of-fact to understand evidence or determine a fact in issue.[16] The Rule is literally permissive, and implicitly imposes a degree of regulation upon subjects and theories upon which, and the circumstances in which, a witness may testify as an expert.[17] The *Daubert* Court enunciates the degree of regulation implicit in Rule 702 by teaching that a trial court faced with the proffer of expert testimony must, at the outset, determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier-of-fact.[18] Quite plainly, an affirmative duty is placed

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16. As used in Rule 702, *Federal Rules of Evidence*, the adjective scientific connotes a grounding in methods and procedures of science, and knowledge connotes more than subjective belief or unsupported speculation.

17. The *Daubert* holding is narrowly limited to expert witnesses professing scientific knowledge, but this Court cannot identify good reason for distinguishing between scientific and technical or other specialized knowledge, and perceives great advantage in fashioning a single conceptual framework applicable to Rule 702 generally. Cf., *Reference Manual on Scientific Evidence*, Federal Judicial Center, pp. 84-86 (1994); *Sorensen v. Shaklee Corp.*, 3 F.3d 638, 647 8th Cir. 1994).

18. This Court's understanding of the ramifications of *Daubert* was derived from the opinion, subsequent case law and other sources; e.g., *Red Manual on Scientific Evidence*, Federal Judicial Center 1994; *Standards and Procedures for Determining Admissibility of Expert Evidence After Daubert*, Am. College of Trial Lawyers, 1994; *New Directions in Federal Civil Practice*, ALI-ABA, 1995.

upon the Court which must be discharged regardless of whether there is opposition to admission of a particular expert's testimony.[19] The Court must exclude proffered expert testimony unless it is convinced that the proposed testimony speaks clearly and directly to an issue in dispute, and that it will not mislead the trier-of-fact. See, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1321 n. 17 (9th Cir. 1995) (after remand). There are two bases upon which an expert's testimony will be most often excluded:

> (1) that the evidence is not sufficiently scientifically reliable, or
>
> (2) that the witness does not have sufficient specialized knowledge to assist the trier of fact.

See, *3 Weinstein & Berger, Weinstein's Evidence*, ¶702(01) (1992). Intertwined, is the Court's obligation under Rule 703, *Federal Rules of Evidence*. A court must make an independent evaluation of the data upon which an expert's opinion is based. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 747-48 (3rd Cir. 1994); *Early v. Richardson-Merrill. Inc.*, 897 F.2d 1159, 1161-62 (D.C. Cir. 1989), cert. den., 498 U.S. 950 (1990); *"Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (NY 1985) (Weinstein, J.). In this analysis, a court may take into account evidence that other experts reasonably rely upon such data, the opinion of experts on the reliability of such data, and any other facts or factors deemed relevant. The touchstone of admissibility is reliability, and, if the underlying

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19. This Court rejects a contrary interpretation placed upon the unambiguous language of *Daubert* by the author of *Procedural Paradigms for Applying the Daunted Test*, 78 Minn. L.R. 1345, 1365 (1994).

data is unreliable to the extent that a reasonable expert would not base an opinion on the data, an opinion based upon that data is inadmissible. In other words, the question is whether or not the expert had good, solid grounds to rely upon the data to draw the conclusion he reached to a reasonable degree of professional certainty. The rather plain teaching of *Daubert* is that the day is past when rote incantation of the mystical "to a reasonable medical certainty" is, in and of itself, sufficient to establish foundation for expression of a medical opinion. Without more than mere qualification as a medical practitioner, the phrase itself is only a personal opinion. There is an aura of infallibility shrouding a physician's testimony, and courts must guard against indiscriminate acceptance of opinions not founded upon scientific knowledge.[20] In the post-*Daubert* world, the trial court must initially face the complex and daunting task of determining whether or not a medical or other expert's testimony reflects scientific knowledge. This assessment is concerned with scientific validity; i.e., whether or not the conclusions have a reliable basis in the knowledge and experience of the expert's discipline, and focuses upon methodology utilized by the witness. *Daubert v. Merrill Dow Pharmaceuticals. Inc.*, supra at 2796-97.[21] The proponent of expert testimony bears the

20. This Court is aware that the Supreme Court has upheld admission of a psychiatrists prediction of future conduct by reasoning that such testimony is not "almost always unreliable, and that the adversary system is competent to uncover, recognize and take due account of shortcomings in the testimony. See, *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983). Justices Marshall, Brennan, Stevens and Blackman joined in rather vigorous dissent, and this Court is baffled by the seemingly negative test of reliability. That something is not almost always unreliable does not make it reliable.

21. At this stage, the inquiry is to principles and methodology, not into the witnesses' conclusions. Whether or not an expert's conclusions were actually reached by an accepted methodology; i.e., were derived from scientific method, amount to good science or are relevant, are matters for later consideration.

burden of persuading the Court that the witnesses' findings and opinions are based upon sound science by demonstrating that there is objective, independent validation of the methodology employed by the witness. The *Daubert* Court provided an illustrative list of factors that the Court may consider in resolving the issue, but these factors are not amenable to application in every case, and the Court must look to any factors which persuasively show that the expert relied upon research, studies, analysis or techniques which have been subjected to scientific scrutiny to support proffered conclusions. Where more objective evidence is not available, the proponent of expert testimony may seek to establish that an opinion is based upon scientific knowledge by an explanation which shows that he followed a methodology, advanced by some objective source, which is scientifically valid, in delving into whether or not a witness utilized a scientifically acceptable methodology, the Court cannot evaluate the methodology beyond determining that it reflects scientific knowledge and that it results in reasonably reliable conclusions. In short, the Court must engage in an initial inquiry to determine whether or not the proposed testimony reflects scientific knowledge and will aid in understanding or determining a fact issue, *Pioneer Hi-Bred Int'l. v. Holden Founda. Seeds*, 35 F.3d 1226, 1230 (8th Cir. 1994); *United States v. Martinez*, 3 F.3d 1191, 1196 (8th Cir. 1993), cert. den., 114 S.Ct. 734 (1994), and *Daubert* teaches that an expert's opinion is not admissible in absence of evidence that the state of pertinent art or scientific knowledge provides adequate scientific foundation for the opinion.

In the run-of-the-mill personal injury case, *Daubert* will probably have little import. Physical injury diagnosis, causation and prognosis are ordinarily established objectively. In contrast, the fields of psychology and psychiatry involve subjective evaluation of abstract concepts. These practitioners deal with

workings of the mind. The mind is an elusive non-material entity existing someplace in the body separate from physical tissues. It is where intelligence, ability to make decisions, perceptions, awareness and sense of self reside, but how it works has baffled mankind since the time of Plato. Absent physical damage to the brain, or chemical imbalance, modern science cannot explain the mechanics of a malfunction of the mind.[22] The diagnosis of a mental disorder is largely a subjective evaluation based upon symptoms reported by the patient which the examiner relates to a constellation of symptoms which constitute the criteria for a particular mental disorder. Analysis of methodology utilized to formulate opinions regarding mental disorders or aberrations requires a more searching scrutiny than that necessary in less chimerical medical fields to assure that the opinion is rooted in scientific knowledge, not a personal predilection.

We can segment opinions proffered by psychiatrists and psychologists in this case into three categories: diagnostic opinions, opinions on causation and prognostic opinions. In reaching a diagnosis, most, if not all, of the psychiatrists and psychologists made reference to reliance upon either the Third or Fourth Edition of the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (the DSM).[23] The DSM, a tome of about 900 pages, was developed to provide a practical guide to clinical practice, to facilitate research and to improve communication. *DSM-IV*, at xv. The

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22. In spite of dramatic scientific advances, all doubt over whether the human mind is capable of comprehending the human mind have not been dispelled. See, *Time*, July 17, 1995, pp. 44 *et seq*.

23. The Fourth Edition was admitted into evidence.

format consists of categorical classifications which segregate mental disorders[24] into identifiable types based upon criteria which define features. *Id.*, at xxii. Each mental disorder categorized is conceptualized as a clinically significant behavioral or psychological syndrome or pattern which is associated with present distress, disability or a significantly increased risk of death, pain, disability or loss of freedom, which is not an expectable or culturally sanctioned response to a specific event, *Id.*, at xxi; and which, whatever its cause, is a manifestation of behavioral, psychological or biological dysfunction. A consistent operational definition of a mental disorder is foreign to the concept of a mental disorder, and, therefore, DSM criteria are defined in various levels of abstraction, and, represent consensus at the time of publication. The criteria will require revision to reflect newly unearthed data and information. The Manual is, essentially, only a guide to aid in diagnosis, and cannot be applied mechanically in "cookbook" fashion. *Id.*, at xxiii. The Manual does not establish absolute boundaries separating mental disorders from one another, the criteria overlap, and the Manual envisions an individualized diagnosis, based upon more than a simple recitation of symptoms, in which proper weight is given to all relevant factors, including a different diagnosis, and ethic and cultural considerations. Cf. *DSM-IV* p. 427.[25] Of prime importance is recognition that there is a difference between information pertinent to a clinical diagnosis and masters of ultimate concern to the law.[26] A clinical diagnosis of a mental

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24. The term "mental disorders" is a reductionistic anachronism of mind/body dualism which is used for want of a more appropriate term. See, *DSM-IV*, at xxi.

25. Appendix A of *DSM-IV*, pp. 689-700, contains Decision Trees for Differential Diagnosis.

26. Rarely is a clinical diagnosis reached for treatment purposes rendered to a reasonable degree of medical certainty. See, *Trans., Vol . XVII*, p. 42 .

disorder under a provision of DSM-IV is not sufficient to establish a mental disorder for legal purposes, and most diagnoses do not incorporate implications of the cause of the mental disorder, of its associated impairments, or of the degree of control the individual has over associated behavior. *Id,*. at xxiii.

The DSM utilizes a multi-Axis system, and one discerns a strong suggestion that the format be followed in recording a diagnosis.[27]

> Axis I is for recording all classified disorders or conditions, except for Personality Disorders and Mental Retardation.
>
> Axis II is for recording Personality Disorders, Mental Retardation or prominent maladaptive personality features and defense mechanisms.
>
> Axis III is for recording general medical conditions potentially relevant to understanding or *managing* a mental disorder.
>
> Axis IV is for recording psychosocial or environmental problems, including negative life events, any environmental difficulty or deficiency, and familial or other interpersonal stress. (The DSM contains a grouping of such problem. which includes disruption of family by separation, estrangement or divorce; sexual or physical abuse; poverty and inadequate finances.).

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27. A form of diagnosis which does not use the multi-Axis system is provided. *DSM-IV*, p. 35.

Appendix C

This Court has concluded that a diagnostic opinion reached by adherence to the methodology established by the DSM is based upon scientific knowledge, and is admissible, if relevant, subject to several caveats.

First, although not specifically considered in the DSM, an initial interview, wherein the subject relates her perception or version of events and circumstances and her symptoms, etc., is essential to a diagnosis. Dr. Randall LaKosky, a psychiatrist called to testify by plaintiffs, testified that this initial interview provides 90% of the basis for a diagnosis. There is, however, no written or generally accepted and utilized format or protocol for conducting the interview. The scope of the field of exploration, the manner of inquiry and the conduct of the interview are matters of taste, discretion or predilection of the interviewer, and the direction of the interview will be guided by the purpose of the examiner in conducting the interview. The approach which a psychologist or psychiatrist adopts for a patient who seeks treatment differs greatly from the approach adopted for a forensic evaluation. *Trans.. Vol. XXIII*, pp. 34-38. When treating a patient, an uncritical ear is lent to the patient's complaints, symptoms and perception of events, with a view to gaining insight and understanding upon which to treat symptoms. The focus is upon the patient's inner world, not upon the reality of the external world. The clinical diagnoses by the treating psychiatrists or psychologists were, in this case, based, almost entirely, upon subjective symptoms and the version of facts related by the claimant, without regard to truth or to collateral sources of relevant information, and the course of treatment was directed to alleviation of symptoms, rather than to treat an identified disease as such. One is almost ineluctably led to conclude that the label placed upon the composite of symptoms reported by the patient has clinical value for treatment purposes, but has little forensic relevance.

Second, although the methodology for diagnosis of a mental disorder outlined in DSM is scientifically sound, we cannot assume that mere reference to the text by the examiner establishes compliance with the methodology. In addition to determining that the methodology was scientifically sound, the Court must engage in a fact specific inquiry to determine whether or not the expert adhered to the methodology. A variance in the methodology may skew the methodology to point of nullification, destroy its scientific validity, and render the conclusions inadmissible; or, on the other hand, a variance may be less significant and merely go to the weight of the conclusion. Cf., *Paoli R.R. Yard PCB Litigation,* 35 F.2d 717, 743, 746 (3d Cir. 1994), cert. den., 1155 S.Ct. 1253 (1995). An attempt to distinguish between a variance in methodology which destroys its validity and a variance which merely impacts adversely on conclusions becomes an exercise in metaphysics. The burden of this exercise far outweighs any practical value which can be derived from its resolution. This Court, therefore, determined that the reliability and the evidentiary weight to be afforded diagnostic opinions would be determined by the degree of adherence to the DSM methodology. Of particular importance in this regard is the DSM emphasis on differential diagnosis. This is the subject of special discussion in the text pertaining to virtually every one of the legion of mental disorders classified. Ordinarily, a properly performed differential diagnosis involves a reasonably complete inquiry into the patient's past and present complaints and symptoms and into her medical and social history. With these facts at hand, the examiner can engage in an analytic process to identify other possible disorders and causes of symptomatology, and can then eliminate some of the possibilities which are unsupportable. This exclusionary process is essential to a properly reached diagnosis, and has lead many courts to conclude that an opinion of a physician who has engaged in few standard differential diagnostic techniques should

always be excluded unless the physician provides good justification for his conclusions. Cf., *Paoli R.R. Yard PCB-Litigation*, supra at 761.

Opinions regarding causation or prognosis rendered by psychiatrists or psychologists are a different matter. The DSM does not provide a methodology based upon scientific knowledge which can serve to support an opinion regarding causation of a mental disorder when there is more than one possible cause, or which can serve to support a prognostic opinion. Cf., *DSM-IV*, at xxiii. Generally speaking, the etiology of a mental disorder can be genetic, physiological or environmental, e.g., stress. Stress is an intrapsychic perception which is peculiar to each individual. Specific stressors do not produce specific symptoms in everyone, because all persons will not react in the same way to a stressor. *Trans.. Vol. XXII*, pp. 44, 71, 116. There is, therefore, no scientifically developed psychiatric model or procedure for determining whether a particular stress caused a particular symptom or mental state. Trans.. Vol. XXII, pp. 69-72, 75-77; Vol. XXIII, pp. 229-230. That an expert's opinion on either causation or prognosis has basis in scientific knowledge and is reliable must be established by a methodology or means other than any found in the DSM, if possible.[28] The evidence establishes that, while working at Eveleth Mines and previously, most of the claimants were subjected to outside stresses or trauma, or suffered from emotional problems, which could have had psychological impact and caused symptomatology. No one advanced a validated theory which furnishes a scientific basis for distinguishing between the causal effect of multiple psychological

28. Some courts have indicated that an expert's opinion on causation should always be excluded absent utilization of standard differential diagnostic techniques to rule out alternative causes. Cf., *Paoli R.R. Yard PCB Litigation*, supra at 761.

stresses or trauma, or for assigning relative impact or degree of impact to different trauma or stresses. This Court is persuaded by unanimous testimony of psychiatrists and psychologists, called by both sides, that there is no scientific method for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists. Cf., e.g., *Trance.. Vol. XXIII*, pp. 227-230, 239-41; *Vol. XXII*, pp. 69-72, 75. This Court tends to agree with a distinguished jurist's observation:

> " 'Experts' . . . know no more than judges about what causes mental change — which is to say that they know almost nothing."

Bohen v. City of East Chicago. Ind., 622 F. Supp. 1234, 1243 n. 4 (Inc. 1985), rev'd. o/grds., 799 F.2d 1180. (7th Cir. 1986).

This Court was, therefore, constrained to rule that expert opinions regarding causation of mental disorders were inadmissible.

Similarly, there is no scientifically validated methodology for predicting the duration of symptomatology accompanying a mental disorder or for formulating a prognostic opinion.[29] Opinions in this regard were ruled inadmissible, and, where they were slipped in, even when prefaced with the magical words "to a reasonable degree of medical [or psychological] certainty", the opinions were matters of personal judgment without supporting substantive basis, reason or data. These opinions are afforded no evidentiary weight.

* * *

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29. Dr. LaKosky also testified that psychiatrists and psychologists are not good prognosticators about when a person should return to work.

Appendix C

COMPLETE COPY OF THE REPORT OF THE SPECIAL MASTER

(Omitted here but submitted separately as Lodging Appendix)

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 18, 1998

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-1147MNST

Lois E. Jensen, et al.

Appellants,

v.

Eveleth Taconite Company, et al.,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Wollman, Judge Beam, Judge Hansen, and Judge Morris Sheppard Arnold would grant the suggestion.

The petition for rehearing by the panel is also denied.

Judge Loken took no part in the consideration or decision of this case.

February 18, 1998

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 28 1998
CLERK

No. 97-1765

In The

Supreme Court of the United States

October Term, 1997

OGLEBAY NORTON COMPANY,

Petitioner,

vs.

LOIS E. JENSON, PATRICIA S. KOSMACH, KATHLEEN O'BRIEN ANDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the record shows that the District Court unfairly considered and disallowed foundation testimony for expert opinions, and erred in assessing the reliability of expert testimony, may the reviewing Court reverse the trial court's exclusion of expert opinions under an abuse of discretion standard?

LIST OF PARTIES

Petitioner's list of parties should be amended to add as Respondents Angel Alaspa, Shirley Burton, Audrey Daniels, Marilyn Greiner, Diane Hodge, Joan Hunholtz, Judy Jarvela, Mavie Maki, Michelle Mesich, Priscilla Robich, Debra Sersha, Marcia Steele, Marjorie Tolbert and Denise Vesel. These women are opt-in class members and were appellants below.

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STATEMENT OF THE CASE

The Petition for Certiorari singles out one issue among many interrelated issues which led the United States Court of Appeals for the Eighth Circuit to remand this case for a new trial on the damages available to the Respondents under the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2). Respondents are sixteen female Plaintiffs who successfully proved that Eveleth Mines[1] maintained a sexually hostile work environment as a "standard operating procedure," in violation of state and federal law. *See Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991) (Rosenbaum, J.) (class decision); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 888 (D. Minn. 1993) (Kyle, J.) (class liability decision). After the determination of class-wide liability — which was never appealed — the District Court appointed a Special Master to preside over a trial to determine individual damages under state law for class members.

At the damages trial, the Special Master made legal rulings, including rulings regarding Plaintiffs' expert psychological testimony, that obstructed the Plaintiffs' ability both to lay foundation for expert proof and to prove the nature and cause of their injuries. The District Court adopted the report and recommendations of the Special Master over Plaintiffs' objections. The Plaintiffs appealed to the Eighth Circuit on issues related to damages on their state law claims. The Petitioner did not appeal any issues.

The Eighth Circuit reversed the District Court, and remanded for a re-trial on damages, on two general grounds, both of which affected the damages awards to all Plaintiffs.[2] First, the Court of

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1. Eveleth Mines was owned and operated by Petitioner Oglebay Norton Company at all times relevant to this action.

2. The other bases for reversal focused on claims raised by particular Plaintiffs.

Appeals ruled that the Special Master and District Court had failed to follow state law by misapplying principles of causation, and by improperly allocating the burden of apportioning damages to the Plaintiffs where the Defendant raised a defense of pre-existing condition. *See* App. at 9a-16a.

Second, the Eighth Circuit ruled that the trial court had abused its discretion by categorically excluding Plaintiffs' expert medical testimony about the causes of their emotional distress. It wrote:

> **Upon reading of the record, ineluctably we are led to conclude that the Special Master's exclusion of this testimony did not rest upon any recognized area of discretion. The record strongly suggests the Special Master foreclosed consideration of the evidence based on his own preconceived notions relating to psychiatric proof. The Special Master did not attempt to hide his hostility toward psychological evidence in sexual harassment claims, stating: "Experts . . . know no more than judges about what causes mental changes — which is to say they know almost nothing."**

App. at 21a. This ruling gave rise to the issue Petitioner presents.

As an example of the trial court's abuse of discretion, the Court of Appeals cited the trial court's insistence that — contrary to the record — all of the parties' experts agreed that there is no scientific method for determining the cause of a mental disorder or for allocating proportionate cause when more than one possible cause exists. *See* App. at 20a. The Court of Appeals also criticized the District Court's double standard in excluding the testimony of Plaintiffs' experts while at the same time "generally accepting the opinions of the expert witnesses produced by the Defendant."

Id. at 20a-21a. Moreover, the Special Master's refusal to allow the Plaintiffs' experts to provide the foundation for their opinions reinforced the appellate court's conclusion that the trial court had abused its discretion. *Id.* at 16a-19a, n.11-13.

The Court of Appeals was fully aware that *Joiner v. General Elec. Co.*, 78 F.3d 524 (11th Cir. 1996), *rev'd*, __ U.S. __, 118 S. Ct. 512 (1997) was pending before the Supreme Court at the time it was considering this appeal. The Court decided not to await the outcome of *Joiner* because

> even under a restrictive "abuse of discretion" standard, we find that the Special Master erred as a matter of law in excluding expert testimony on causation. Therefore, resolution of the standard of review question in *Joiner* does not affect our decision in this case.

Id. at 21a, n.15.

This Court issued its opinion in *General Elec. Co. v. Joiner*, __ U.S. __, 118 S. Ct. 512 (1997) after the appellate panel's decision in this case and before Oglebay Norton filed its petition for rehearing and rehearing *en banc* to the Eighth Circuit. In its petition to the Eighth Circuit, the Petitioner raised all of the arguments raised here about the impact of the *Joiner* decision. The full Court of Appeals for the Eighth Circuit considered those arguments and declined to grant rehearing. The Petitioner then sought review from this Court.

REASONS FOR DENYING THE WRIT

Oglebay Norton's Petition for Writ of Certiorari should be denied because the Petitioner's complaint concerns the application of the proper legal standard to the facts. The Eighth Circuit

correctly ruled that the District Court's exclusion of the Plaintiffs' expert psychological testimony did not rest on a proper exercise of discretion, but rather upon the Special Master's "preconceived notions relating to psychiatric proof." App. 21a. The Special Master's errors deprived the Plaintiffs of the only evidence that could link the sexual harassment they experienced at Eveleth Mines to their emotional harm.

Moreover, the Eighth Circuit held the District Court's rulings on the Plaintiffs' expert testimony were made in the context of its misapplication of the burden of proof under state law — a ruling the Petitioner does not ask the Supreme Court to review. Upon remand, the District Court must review expert evidence *de novo* in light of the Eighth Circuit's rulings both on the burden of proof under state law and the application of Rule 702 to the proffered expert evidence. The shifting of the burden may well change not only the trial court's view of the expert evidence, but also the Petitioner's arguments concerning admissibility.[3]

Thus the issue stated by the Petitioner neither fairly reflects the rationale for the Court of Appeals' ruling, nor does it present an issue ripe for review.

I.

THE PETITION FOR CERTIORARI, WHICH MISSTATES THE COURT OF APPEALS' RATIONALE, DOES NOT PRESENT A COMPELLING REASON FOR SUPREME COURT REVIEW.

The Court of Appeals' decision that the Special Master abused his discretion is not a matter appropriate for Supreme Court review. A Petition for Certiorari is only granted for

3. When the Petitioner has the burden of apportioning damages, it may well argue that expert psychiatric evidence on that issue is competent.

compelling reasons and rarely when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Petitioner's attempts to characterize the Court of Appeals' decision as applying the wrong legal standards is contradicted by the standards and grounds for reversal articulated in the Appeals Court's opinion.

The Petitioner distorts the Court of Appeals' decision to characterize it as inconsistent with this Court's subsequent ruling in *General Electric Co. v. Joiner*, __ U.S. __, 118 S. Ct. 512 (1997). In *Joiner*, this Court reaffirmed that the abuse of discretion standard applies to a trial court's decision to admit or exclude expert testimony. The issue arose when the Eleventh Circuit Court of Appeals applied a more stringent standard of review to the trial judge's exclusion of expert testimony because the Eleventh Circuit interpreted the Federal Rules as displaying a preference for admitting expert testimony. *Joiner*, 78 F.3d at 529. This Court reversed, holding that an appellate court may not use a more stringent standard of review than abuse of discretion when examining decisions disallowing expert testimony. *Joiner*, 118 S. Ct. at 517.[4]

The Eighth Circuit in this case did not apply a more stringent standard of review than abuse of discretion in reviewing the Special Master's decision to exclude expert testimony. Instead, as is described in more detail below, the Court reviewed the record and found it replete with indications that the Special Master's exclusion of Plaintiffs' expert psychological testimony was not based on a legitimate exercise of discretion, but rather on "preconceived notions relating to psychiatric proof" and "hostility toward psychological evidence in sexual harassment claims." App.

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4. The Court also held that a more searching standard of review is not required when the exclusion of the expert evidence results in the granting of summary judgment against the Plaintiff. *Joiner*, 118 S. Ct. at 517.

at 21a. The Court of Appeals' ruling is thus completely consistent with *Joiner* and prior decisions of this Court.

The actual and unstated ground on which the Petitioner seeks review is its claim that the Appellate Court used the correct standard of review, but misapplied it to the facts. This does not support a grant of a petition for certiorari. Sup. Ct. R. 10.

II.

THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING PLAINTIFFS' EXPERT PSYCHOLOGICAL TESTIMONY.

An abuse of discretion standard does not mean that the reviewing court lacks the authority or obligation to correct clear errors of law and fact. The Eighth Circuit properly reversed the Special Master who ignored and excluded proffered evidence establishing the reliability and relevance of expert opinions, and then excluded those important and admissible opinions based on hostility to psychological evidence.

A. A District Court is Not Free to Close the Gate on Relevant and Reliable Expert Psychological Evidence.

As this Court recently reiterated, an abuse of discretion standard of review "does not mean appellate review is an empty exercise." *Koon v. United States*, 518 U.S. 81, 98 (1996). In particular, an error of law is not beyond appellate correction given that "a district court by definition abuses its discretion when it makes an error of law." *Id.* at 100. Here, the trial court abused its discretion by closing the gate on crucial psychological evidence because it misconstrued the *Daubert* legal standard, and then ignored and excluded critical foundation testimony. In *Daubert*

v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court disapproved the more restrictive "general acceptance" test for admission of scientific proof as inconsistent with Rule 702. It held that scientific evidence need only "rest [ ] on a reliable foundation and [be] relevant to the task at hand" in order to be admitted under Rule 702. *Id.* at 597. The requirements of reliability and relevance under *Daubert* go to the ultimate issue under Rule 702 which is whether the testimony will be "helpful" to or "will assist" the factfinder. *Id.*; *United States v. Johnson*, 28 F.3d 1487, 1496 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1263 (1995). The Eighth Circuit found that the trial court in this case failed to apply these basic requirements properly when it categorically excluded the expert psychological evidence presented by the Plaintiffs. App. at 24a.

The Special Master's categorical exclusion of expert psychological proof in this case is reminiscent of the evidentiary ruling disapproved in *Barefoot v. Estelle*, 463 U.S. 880 (1983). There, a death row defendant objected to the admissibility of psychiatric evaluations of his "future dangerousness" in capital sentencing proceedings, claiming such predictions were too unreliable. The Court said the defendant's suggestion was "like asking us to disinvent the wheel." *Id.* at 896. It declared that barring such testimony "would . . . call into question those other contexts in which predictions of future behavior are constantly made." *Id.* at 898. The Supreme Court declared, even before rejecting the more restrictive rule in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), that the

> rules of evidence . . . anticipate that a psychiatric evaluation will be received and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence . . . .

Id. at 898.

Indeed, this Court has repeatedly treated the testimony of psychiatric and psychological experts as reliable and sometimes constitutionally required in the criminal context. *See Medina v. California*, 505 U.S. 437, 465 (1992) (psychiatric expert testimony is to be given great weight even if psychiatric opinions are not infallible because psychiatrists are the best informed and most able to judge a defendant's competence to stand trial); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (in some circumstances, due process requires that the state provide psychiatric expert testimony for a defendant asserting insanity as a defense and in the sentencing phase); *Rhodes v. Chapman*, 452 U.S. 337, 363 (1981) (noting that a court must be open to the testimony of psychological experts, among others, in assessing a claim that prison conditions constitute cruel and unusual punishment). This treatment is at odds with the Special Master's blanket dismissal that experts "know no more than judges about what causes mental changes — which is to say they know almost nothing." App. at 21a (quoting the Special Master).

The Special Master abused his discretion by not treating the proffered expert testimony in the manner explained by the Supreme Court in *Barefoot v. Estelle*. If psychiatric predictions of "future dangerousness" are admissible, and expert testimony regarding insanity and mental competence is so trusted that it is sometimes required by due process, surely the Eighth Circuit was correct in its view of the Special Master's intemperate assessment of such evidence.

Moreover, the Special Master's exclusion of expert psychological testimony on the cause of mental harm is contrary to the overwhelming body of cases where courts have admitted such proof because it is very helpful to the trier of fact. Even before *Daubert*, opinions of mental health experts pertaining to causation and future duration of mental injury were typically received as helpful to the factfinder pursuant to Rule 702 under

the more restrictive "general acceptance" rule of *Frye*. In *Busby v. City of Orlando*, 931 F.2d 764, 782 (11th Cir. 1991), the court held that expert testimony on the "psychological impact" of discrimination was directly relevant to the issue of causation of mental harm and was wrongly excluded. The courts have recognized that "[s]uch expert opinion is the prime — indeed usually the only — way to prove medical causation." *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 164 n.4 (4th Cir. 1988). *See also Brady v. Gebbie*, 859 F.2d 1543, 1558 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989) (psychiatric testimony amply demonstrated nexus between denial of due process and emotional distress).[5]

The adoption in *Daubert* of a *less* restrictive rule of admissibility expanded the range of admissible evidence under *Frye*. It is therefore not surprising that courts have consistently continued to receive expert proof of mental damages since the *Daubert* decision. *See, e.g., Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1692 (1997) (emphasizing the probative value of expert testimony in proving the cause of plaintiff's emotional distress). Indeed, the trend among the courts is to hold that discrimination plaintiffs cannot prove emotional distress without expert psychological testimony linking emotional harm to discrimination. *See, e.g., Patterson v. P.H.P. Healthcare*, 90 F.3d 927, 939 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997) (holding that *Carey v. Piphus*, 435 U.S. 245, 255-56 (1978) requires corroborating testimony or medical or psychological evidence to support an emotional distress damage award).

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5. *See also Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987) (psychiatric testimony supported damage award for emotional distress); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 776 n.3, 782 (S.D. Ohio 1988) (expert psychiatric opinion that harassment caused plaintiff's emotional distress); *Spencer v. General Elec. Co.*, 688 F. Supp. 1072, 1075 n.7 (E.D. Va. 1988) (PTSD testimony admissible to prove damages).

The Court of Appeals correctly applied the *Daubert* standard in ruling that Plaintiffs' proffered proof of mental damages from well-qualified, highly-experienced psychological experts should have been admitted and assigned its appropriate weight. Its ruling that the categorical exclusion of such proof based on hostility to the fields of psychiatry and psychology was an abuse of discretion correctly applies the standards articulated by this Court.

B. The Special Master Excluded and Misinterpreted Expert Foundation Testimony.

In support of its finding that the Special Master had abused his discretion, the Appeals Court cited to numerous instances in the record where the Special Master had refused to allow the Plaintiffs' experts to testify regarding the bases for their opinions. For example, Dr. Carol Novak, a psychiatrist who had examined six of the Plaintiffs, was not allowed to testify:

- whether the Diagnostic Statistical Manual directs that it is to be used in conjunction with clinical judgment;
- why it is important to determine the cause of a mental disorder;
- whether there are different categories of causes that bring about mental disorders;
- whether as part of her diagnosis she must decide if a particular category of causes led to a mental disorder;
- what kind of behavior [such as sexual harassment] she looked for to diagnose Post Traumatic Stress Disorder (PTSD);

- whether she had any preconceived ideas regarding her findings on causation;

- whether the Plaintiffs' PTSD was chronic or acute;

- what symptoms of PTSD were experienced by a Plaintiff during the time she was working at the mines;

- whether the symptoms a Plaintiff was now experiencing could have been caused by a rape when the Plaintiff was 19 years old;

- what symptoms a Plaintiff displayed that were specifically related to sexual harassment;

- whether she had identified symptoms that were associated with traumatic events of sexual harassment that led to a diagnosis of anxiety disorder.

App. at 16a, n.11 (citations omitted). The Court of Appeals found that the Special Master excluded similar foundation evidence from every one of the Plaintiffs' expert psychological witnesses. *Id.* at 17a-18a, n.12 (Dr. Bell), 18a-19a, n.13 (Dr. Mayberg). In this fashion, the Special Master bolstered his idiosyncratic view of the unreliability of expert psychological testimony by refusing to allow Plaintiffs' experts to explain the bases for their opinions regarding the cause of Plaintiffs' mental harm and prognosis.

The Eighth Circuit also rejected the Special Master's rationalization that highly relevant and reliable expert testimony should be excluded because of supposed "admissions" attributed to Plaintiffs' experts that psychiatric proof on the cause of mental disorders is inherently incompetent. The record does not contain

any such "admissions."[6] The Eighth Circuit also found "difficult to explain" the Special Master's general acceptance of expert psychological evidence proffered by the Defendants, despite the skepticism with which he treated the same type of evidence when proffered by the Plaintiffs. App. at 20a-21a. The appellate court's opinion that the Special Master abused his discretion by excluding and misinterpreting evidence was well supported.

C. The Petitioner Repeats the Special Master's Distortion of the Record Evidence.

In its Petition, Oglebay Norton repeats assertions from the Special Master's report which were unsupported in the record below. Contrary to statements in the Petition, the Plaintiffs' experts relied on informed, clinical judgment, not simply personal judgment, and did conduct differential diagnoses. *See* Petition at 4 and 5. A fair examination of the testimony of the claimants' experts shows that they all described their methodology for determining causation. *E.g.* A. 2254 (Dr. Novak looks at type of stressor, timing, symptoms' relationship to number of stressors, observation in medical exam when describing stressor); A. 2387-88 (Dr. Bell examines the timing of the stressor and symptoms, self report of the patient, duration, frequency and intensity of the stressor); A. 2098-99 (Dr. Mayberg focuses on the Axis IV diagnosis of stressors in the DSM and applies his clinical experience and professional judgment).[7]

The Plaintiffs' experts testified that they reached sound opinions regarding the cause of the Plaintiffs' mental harm through:

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6. To support his assertion that the Plaintiffs' experts admitted that there was no scientific method for determining the cause of a mental disorder, the Special Master cited *e.g.*, Trans. Vol. XXIII pp. 227-230, 239-241; Vol. XXII, pp. 69-72, 75. These pages of the transcript do not support that proposition.

7. Citations are to the Appendix filed with the Eighth Circuit.

(1) using the framework provided by the DSM; (2) conducting mental status examinations; (3) securing other pertinent information in the psychiatric interview; and (4) applying their specialized knowledge derived from professional experience to evaluate the effect of offensive conditions at Eveleth Mines in light of other stressors in the Plaintiffs' lives. Opinions arrived at in this fashion are the grist of forensic psychiatry. To exclude or discount them as representing mere "personal judgments" distorts the record.

Equally unsupported is the claim that the Plaintiffs' experts did not perform differential diagnoses. For example, Dr. Novak testified she analyzed information she obtained from a psychiatric interview, medical and psychological records, and other collateral sources, against the generally accepted and validated multi-axial diagnostic criteria set forth in the Diagnostic and Statistical Manual, III-R and IV Editions (DSM-III-R and DSM-IV). A. 2214-18. For each appellant she examined, Dr. Novak conducted a differential diagnosis, formulating as many potential diagnoses as possible, then ruling out some of them by applying the DSM-IV criteria, using clinical judgment and referring to psychiatric literature. A. 2218-23, 2230-32, 2238; A. 2253-54, 2256. Each one of the Plaintiffs' experts provided similar foundation for his or her opinion that was similarly ignored by the Special Master and the Petitioner.

III.

THERE IS NO BASIS FOR REVERSAL OR REMAND IN LIGHT OF *JOINER.*

The Petitioner fully briefed its argument concerning the application of *Joiner* in its petition for rehearing and rehearing *en banc*. The full Eighth Circuit considered whether *Joiner* would

alter the panel's decision, and rejected the petition for rehearing. Thus not only did the Eighth Circuit panel initially apply the abuse of discretion standard consistent with *Joiner*, but the entire Eighth Circuit has assessed the impact of the *Joiner* decision itself. Both prospectively and retrospectively, the Court of Appeals correctly applied the abuse of discretion standard in this case in a manner wholly compatible with *Joiner*. Thus, there is no basis for summarily reversing or remanding in light of *Joiner*.

Moreover, the Petitioner's request for summary reversal completely ignores the other grounds that led the Eighth Circuit to reverse the trial court. In particular, the Appeals Court held that the trial court had misapplied the burden of proving apportionment of emotional distress damage under state law. App. at 10a-14a. This ruling could well change the parties' positions on reliability of expert proof on remand to the trial court. Thus reversal is inappropriate for the additional reason that it would be both fruitless and premature.

CONCLUSION

The Petitioner has offered no basis for the Court to review the Court of Appeals' proper application of legal standards in this case. The Petition should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

OGLEBAY NORTON COMPANY,

Petitioner,

vs.

LOIS E. JENSON, PATRICIA S. KOSMACH, KATHLEEN O'BRIEN ANDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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THE COURT OF APPEALS DID NOT FIND THAT THE TRIAL COURT HAD ABUSED ITS DISCRETION BY REQUIRING THAT OPINION TESTIMONY BE PRESENTED IN THE FORM OF WRITTEN REPORTS

Petitioner has already addressed Respondents' claim that their experts "all described their methodology for determining causation," (Respondent's Brief at 12), that each expert "provided similar foundation" including differential diagnosis, and that this evidence "was ignored by the Special Master." (Respondent's Brief at 13).[1]

But respondents also argue, paradoxically, that the trial court ". . . excluded critical foundation testimony," and that these exclusionary rulings abused the trial court's discretion. (Respondent's Brief at 6). This latter point is not addressed in the Petition, nor was it properly addressed by the Court of Appeals.

As he explained in his Report (App. at 78a), the Special Master directed the parties to prepare and submit written reports which would serve as their experts' direct testimony. At trial, the direct examination of an expert was limited to "clarifying" what was disclosed in his/her report. Requiring that opinion testimony be presented in the form of written reports is within the discretion of the trial court under Evidence Rule 611(a) and Federal Civil Procedure Rules 16 and 26. *See, e.g., In re Adair*, 965 F.2d 777,

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1. This Court's decision in *General Electric Co. v. Joiner*, __ U.S. __, 118 S. Ct. 512 (1997) directs reviewing courts to defer to the discretion of the trial court when determining whether an expert's opinion is founded on "scientific knowledge." In this case, the Court of Appeals ignored the trial court's negative findings as to the scientific validity of respondents' experts' opinions, relying instead on their general qualifications, and the fact that causation opinions by other experts have been received in other mental and emotional injury cases.

779 (9th Cir. 1992); *Saverson v. Levitt*, 162 F.R.D. 407 (D.D.C. 1995).

If pertinent foundation testimony was excluded by any of the rulings referenced in Respondents' Brief (at 10-11), the excluded testimony was outside the scope of the expert's written report.[2] While the Court of Appeal's opinion alludes to these

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2. The testimony of Dr. Novak (App. at 16a-17a, n.11) that was excluded because it was outside the scope of her report included what kind of behavior she looked for to diagnose post-traumatic stress disorder ("PTSD") (Trial Tr. Vol. XXIV at 22-27), whether she had preconceived ideas regarding her findings on causation, and whether plaintiff's PTSD was chronic or acute (*id.* at 46-48), what symptoms of PTSD plaintiff experienced during the time she was working at the mines and whether plaintiff's then current symptoms could have been caused by a rape when plaintiff was 19 years old (*id.* at 52-54), the symptoms that plaintiff displayed that were specifically related to sexual harassment (*id.* at 72-73) and whether Dr. Novak had identified symptoms that were associated with traumatic events of sexual harassment that led to a diagnosis of anxiety disorder (*id.* at 99-100).

The testimony of Dr. Bell (App. at 17a-18a, n. 12), that was excluded as outside her report included testimony as to what events she considered to be contributing to the diagnosis of anxiety disorder, whether she ruled out any other potential contributing factors of the source of the diagnosis, whether an abusive family history had any effect on the condition of the plaintiff (Trial Tr. Vol. XXV at 22-23) whether psychologists are capable of making diagnoses regarding psychological factors affecting physical conditions, whether she had made such a diagnosis in the past (*id.* at 159-60) and the specific events she considered to be contributing factors to her diagnosis of PTSD (*id.* at 63).

The testimony of Dr. Mayberg (App. at 18a-19a, n. 13), that was excluded as outside his report included testimony as to whether physical reactions to harassment are the kind of symptoms he would use in his diagnostic methodology, whether particular symptoms fit into the diagnostic methodology, whether sexual harassment in the workplace is recognized as a "stress" (Trial Tr. Vol. XXII at 19), his conclusions regarding the stresses plaintiff was experiencing and the behavior she was exhibiting, his opinion on plaintiff's prognosis and any other stressors on plaintiff, other than those listed in the expert's report (*id.* at 171-173), whether there was "a relationship between the experiences in the mine of 1984 and the present" and whether plaintiff's physical symptoms were still present (*id.* at 207-209).

exclusionary rulings (App. at 16a-18a, n.11-13); it does not suggest that the trial court abused its discretion by limiting Respondents' to what is disclosed in their experts' written reports. Indeed, the Court of Appeals appears to have been unaware that the Special Master's exclusionary rulings were based on his pretrial order regarding the use of experts' reports.

CONCLUSION

The Court of Appeals' decision regarding admissibility of causation opinions was reached, not by questioning the requirement that the experts' foundation testimony be included in their written reports; but by usurping the trial court's role in evaluating each expert's foundation testimony. If the Special Master's orders controlling the form of the experts' direct testimony in this case warranted separate consideration, this court should summarily reverse and remand for such further consideration.

Respectfully submitted,

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